88-1037

Supreme Court, U.S.
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NO. 88-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

When the defendant is white and his attorney is black, does the Sixth Amendment right to an impartial jury and Batson v. Kentucky, require a prosecutor to explain his peremptory strikes of the only two black veniremen?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15
CERTIFICATION	17
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

TABLE OF CASES AND AUTHORITIES

Case	Page
Batson v. Kentucky 476 U.S. 79 106 S.Ct. 1712 90 L.Ed.2d 69 (1986)	1,4,7,8,9,10, 11,12,13,15
Lockhart v. McCree 476 U.S. 162 106 S.Ct. 1758 90 L.Ed.2d 137 (1986)	7,10
Nevius v. Sumner 852 F.2d 463 (9th Cir. 1988)	9,10
People v. Rousseau 129 Cal.App.3d 526 179 Cal.Rptr. 892 (App. 1982)	4
Peters v. Kiff 407 U.S. 493 92 S.Ct. 2163 33 L.Ed.2d 83 (1972)	12
State v. Superior Court (Maricopa Cty.) 156 Ariz. 512 753 P.2d 1168 (Ct.App. 1987)	1
State v. Superior Ct. In And For Maricopa Cty. ____Ariz.____ 760 P.2d 541 (1988)	1
Teague v. Lane 820 F.2d 832 (7th Cir. 1988)	7,8,12,16

United States v. Chavez-Vernaza
844 F.2d 1368
(9th Cir. 1987) 9

United States v. Vaccaro
816 F.2d 443
(9th Cir. 1987) 9

28 U.S.C.
§ 1257(3) 2

United States Constitution
Sixth Amendment 3,6,7,8,10,11,12,15
Fourteenth Amendment 3,6,12,15

Arizona Rule of Procedure for
Special Actions, 17A A.R.S.
Rule 1 5

OPINIONS BELOW

The Arizona Court of Appeals held that, under Batson v. Kentucky,[1] a white defendant has standing to object to the state's peremptory challenges of black veniremen and that a white defendant could make a prima facie showing of purposeful discrimination, without being a member of the cognizable racial group. State v. Superior Court (Maricopa Cty.), 156 Ariz. 512, 753 P.2d 1168 (Ct.App. 1987). (Appendix C.)

The Arizona Supreme Court supplemented the court of appeals' opinion, holding that a white defendant can invoke the Sixth Amendment to preclude the use of peremptory challenges that exclude any substantial and identifiable class of citizens from the petit jury. State v. Superior Ct. In And For Maricopa Cty., ____Ariz.____, 760 P.2d 541 (1988). (Appendix A.)

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1. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

STATEMENT OF JURISDICTION

The state asks this Court to review the opinion of the Arizona Supreme Court, entered on July 19, 1988. The Arizona Supreme Court denied the state's motion for rehearing on September 20, 1988. (Appendix B.) This petition is filed within 90 days from the denial of reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

By stipulation, the parties applied for a stay of all proceedings, pending review on certiorari.[2] On October 18, 1988, Honorable Daniel E. Nastro granted the stay of proceedings.

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2. All parties have recognized the importance of the issues presented. Since the issues involved concern the propriety or authority to compel explanations for peremptory challenges, proceeding with trial would render the issues moot. Although the criminal case against Mr. Gardner is still pending, the judgment denying relief by special action in the state courts is final.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state . . . .

The pertinent part of the Fourteenth Amendment of the United States Constitution provides:

> [N]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Maricopa County Grand Jury indicted Elden Gardner, real party in interest, for leaving the scene of a fatal automobile accident. His trial before respondent Judge Daniel E. Nastro began on September 24, 1986.

Elden Gardner is Caucasian; his lawyer is black.

During jury selection, the prosecutor peremptorily challenged the only two black veniremen. The defendant objected. Based on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Judge Nastro concluded that the defendant made a prima facie showing of racial discrimination[3] and asked the

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3. The record is not clear concerning what facts or test Judge Nastro used to conclude that the white defendant made a prima facie showing. Referring to People v. Rousseau, 129 Cal.App.3d 526, 536, 179 Cal.Rptr. 892, 897 (App. 1982), Judge Nastro apparently used the California test, which, unlike Batson, does not require a showing of membership in the same cognizable racial group.

prosecutor to explain his use of the peremptories. (Appendix C at C-3.) Arguing that the defense had not made an adequate showing, the prosecutor refused to explain his reasons for striking the jurors. On stipulation, the trial court stayed the proceedings while the prosecutor filed an action in the Arizona Court of Appeals seeking special action relief in the nature of mandamus.[4] The court of appeals granted review, but denied relief. (Appendix C.)

The state then sought relief from the Arizona Supreme Court, both by an independent petition for special action and by a petition for review.

The Arizona Supreme Court concluded that the trial judge relied on the equal

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4. In Arizona, relief previously obtained by extraordinary writs of certiorari, mandamus, and prohibition is now obtained by "special action." (Rule 1, Arizona Rule of Procedure for Special Actions, 17A A.R.S.)

protection clause of the Fourteenth Amendment "and, arguably on the Sixth Amendment right to trial by an impartial jury. . . ." (Appendix A at A-4.) The court granted review and approved the opinion of the court of appeals as supplemented. (Appendix A.) On September 20, 1988, the Arizona Supreme Court denied a timely filed motion for reconsideration. (Appendix B.) The state now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Arizona courts' interpretations of federal constitutional law will allow every defendant to insist upon compelled explanations of peremptory challenges, whether based upon the Sixth Amendment or Batson.

I

AN IDENTICAL OR SIMILAR QUESTION IS PENDING BEFORE THIS COURT.

This Court is presently considering whether the Sixth Amendment right to a trial by an impartial jury compels explanation of peremptory challenges that exclude a distinctive group. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert. granted, ____U.S.____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term, 1987, No. 87-5259). Although this Court has declined to extend the Sixth Amendment fair cross-section principle to petit juries, the Arizona Supreme Court did so in this case. Lockhart v. McCree, 476

U.S. 162, 173-74, 106 S.Ct. 1758, 1764-65, 90 L.Ed.2d 137, 147-48 (1986). This case should be held pending the resolution of Teague, or set for argument to be considered simultaneously.

This petition poses the additional unresolved question of whether a Caucasian may invoke a Batson v. Kentucky claim.

II

THERE IS A CONFLICT BETWEEN THE DECISIONS OF THE COURT OF APPEALS AND HIGHEST STATE COURT WITH THE SAME TERRITORIAL JURISDICTION.

On three occasions, the Ninth Circuit Court of Appeals issued opinions that conflict with that of the Arizona Supreme Court. In response to the nonblack defendants' claim of a violation of Sixth Amendment rights, the Ninth Circuit applied the Batson test and held that nonblack defendants cannot make out a prima facie case of discrimination by peremptory challenges of black veniremen,

and that striking the only two black jurors did not constitute a pattern of systematic exclusion of blacks. United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987), cert. denied, 108 S.Ct. 295 (1987). In United States v. Chavez-Vernaza, 844 F.2d 1368, (9th Cir. 1987), the Ninth Circuit held that, where the government used its peremptory challenges to exclude the only black members of the venire, the Peruvian national defendant did not make a prima facie case under Batson, because he did not show that he was a member of a cognizable racial group and he did not show that the prosecutor exercised peremptory challenges to remove veniremem of the defendant's race.

More recently, in Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), the black defendant contended that the prosecutor's peremptory challenges to exclude black

and Hispanic veniremen violated his Sixth Amendment right to a fair and impartial jury. Citing Lockhart v. McCree, 476 U.S. at 174, the court held that the Sixth Amendment fair cross-section requirement does not apply to the petit jury. Nevius at 466.

The appended Arizona Supreme Court's and Court of Appeals' opinions conflict with the Ninth Circuit by holding that a white defendant can make a prima facie showing of purposeful discrimination under Batson without being a member of a cognizable racial group. The Arizona Supreme Court opinion conflicts with the Ninth Circuit Court of Appeals by extending the Sixth Amendment fair cross-section principle to the selection of the petit jury.

III

THIS CASE PROVIDES THE OPPORTUNITY TO CLEARLY ESTABLISH THE FUTURE OF PEREMPTORY CHALLENGES.

This case of a white defendant with a black attorney, and peremptory challenges of the only two blacks on the jury panel, affords this Court the opportunity to decide and clarify significant recurring questions of constitutional law.

The question of whether the Sixth Amendment fair cross-section principle requires that an attorney explain his peremptory challenges, was specifically presented to this Court in Batson v. Kentucky, 106 S.Ct. at 1716 n.4; however, this Court has yet to answer that question. Arizona contends that the guarantee of a trial by an impartial jury is not violated when there is no claim of partiality or bias in the unchallenged veniremen. The focus of the query should be on the veniremen who remain, not on those who were challenged. The analysis

of the Arizona Supreme Court elevates demographics to a higher priority than the impartiality of the seated jurors.

Even if Sixth Amendment issues are resolved in Teague v. Lane, the question of the defendant's standing to assert constitutional rights under Batson remains confused and unresolved. Based upon this Court's plurality opinion in Peters v. Kiff,[5] the Arizona Court of Appeals concluded that Mr. Gardner had standing to raise a Fourteenth Amendment equal protection claim in petit jury selection, without being a member of the cognizable racial group. This Court should clarify whether Peters, standing for a due process claim, extends to a Batson equal protection claim, so that

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5. Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (a white defendant had standing to assert a claim that exclusion of Negros from the grand jury and petit jury lists violated his Fourteenth Amendment due process rights).

any defendant may assert Batson. Arizona contends that such an extension wrongfully permits Gardner to claim the right of a protected group to which he does not belong.

This Court should also grant review to determine whether the requirement of Batson, that a defendant must show he is a member of a cognizable racial group, is flexible or disposable. The Arizona Court of Appeals subverted the requirement of membership, relying on Batson, 106 S.Ct. at 1721, n.18, which provided:

> Our decisions in the context of Title VII 'disparate treatment' have explained the operation of prima facie burden of proof rules. The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion.

(Citations omitted.) This Court should clarify whether the Batson evidentiary requirement of a defendant's membership in a cognizable group, Batson v. Kentucky, 106 S.Ct. at 1722-23, can be subverted by a

permissive reading of flexible rules in Title 7 cases.

The Arizona opinions below invite boundless piecemeal litigation. Probably the most common aspect to all trials in the United States is jury selection. If the purposes of compelled explanations are truly to eliminate discrimination in petit jury selection, to create petit juries that fairly represent a cross-section of the community, and to avoid the exclusion of identifiable groups from the rights and obligations of jury service, then those purposes could never be fulfilled by a limit of inquiries to prosecutors or even to criminal cases. The doors opened by the Arizona Supreme Court threaten to create a plethora of workability problems, which far outweigh the theoretical protection from the possibility of discrimination in peremptory challenges.

CONCLUSION

The Fourteenth Amendment equal protection of the laws does not require that a prosecutor explain his peremptory challenges of the only two black jurors in response to the objection of a white defendant. The Arizona Supreme Court's approval of the Arizona Court of Appeals' opinion erroneously extends Batson v. Kentucky to compel an explanation.

Further, the Arizona Supreme Court erroneously extended the Sixth Amendment fair cross-section principle to the petit juries, which this Court has declined to do. The Arizona decisions are in conflict with those of the Ninth Circuit Court of Appeals.

Because of the importance of the issues, the conflict between the highest state court and the federal appellate court having the same territorial jurisdiction, and the identical or

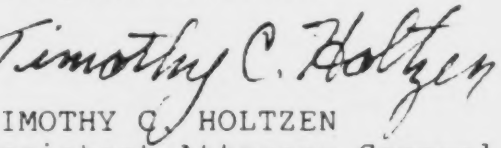
similar issue before this Court in Teague v. Lane, the petitioner requests that this Court accept the petition for writ of certiorari and review the conjoined opinions of the Arizona Supreme Court and the Arizona Court of Appeals.

DATED this 14th day of December, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division



TIMOTHY C. HOLTZEN
Assistant Attorney General

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TIMOTHY C. HOLTZEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Dean W. Trebesch, Maricopa County Public Defender, 132 South Central, 2nd Floor, Phoenix, Arizona, 85004, attorney for Elden Gardner, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Additionally, as a courtesy, he herewith certifies that service of one copy of this petition has been made upon the Honorable Daniel E. Nastro, Judge of the Maricopa County Superior Court, 101 West Jefferson, #612, Phoenix, Arizona 85003-0000, by depositing the same in the United States Mail, with first class postage prepaid.

DATED this 14th day of December, 1988.

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SUBSCRIBED AND SWORN to before me this 14th day of December, 1988.

Chris L. Piske

CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1989

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APPENDICES

APPENDIX A

[Filed July 19, 1988]

IN THE SUPREME COURT OF
THE STATE OF ARIZONA
En banc

STATE OF ARIZONA, through the Criminal Division of the Attorney General's Office,	)	Supreme Court No. CV-87-0111-PR
Petitioner,	)	
vs.	)	Court of Appeals No. 1 CA-SA 025
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, HONORABLE DANIEL E. NASTRO, a Judge thereof,	)	
Respondent Judge,	)	Maricopa County No. CR-155598
ELDEN GARDNER,	)	
Real Party in Interest.	)	

Appeal from the Superior Court
of Maricopa County

The Honorable Daniel E. Nastro, Judge

AFFIRMED

Opinion of the Court of Appeals, Division One, ____Ariz.____, ____P.2d ____ (App. 1987) Approved as Supplemented

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Attorneys for Petitioner

Dean W. Trebesch — Phoenix
Maricopa County Public Defender
By: Stephen M. R. Rempe
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Feldman, Vice Chief Justice

The state seeks relief from an order requiring the prosecutor to explain his use of peremptory challenges against two Black members of a jury panel. The court of appeals affirmed, State v. Superior Court, No. 1 CA-SA 025 (Ariz.Ct.App. Jan. 22, 1987), and we granted review to consider whether a Caucasian defendant has standing to object to a prosecutor's alleged discriminatory use of peremptory challenges to remove all Black members of a jury panel. We have jurisdiction under Ariz. Const. art. 6, § 5.

FACTS

Defendant, Elden Gardner, was charged with leaving the scene of a fatal accident, a class 6 felony. A.R.S. §§ 28-661 and -663. Gardner is Caucasian; his trial attorney was a Black deputy public defender. During jury selection in Maricopa County Superior Court, the prosecutor used peremptory challenges to strike the only two Black members of the jury panel. Gardner objected. After a hearing, the trial judge concluded the defendant had made a prima facie showing of racial discrimination and asked the prosecutor to explain the use of the peremptories. The prosecutor refused, claiming the judge had no power to initiate such an inquiry except in cases where the defendant and the excluded veniremen were members of the same cognizable racial

group. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Because the challenged jurors were Black and defendant was Caucasian, the state argued that the Batson rule was inapplicable. Relying on the equal protection clause of the fourteenth amendment and, arguably, also on the sixth amendment right to trial by an impartial jury, the judge ruled that he had a proper basis to inquire into the prosecutor's motives in using the peremptory challenge to strike the Black veniremen.

The state sought special action relief from the court of appeals.[1] That court stayed further proceedings in the trial court, accepted jurisdiction of the

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[1] In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Arizona Rules of Procedure for Special Actions, 17A A.R.S.

special action petition and denied relief from the trial court's ruling. The court of appeals held that a Caucasian defendant had standing to challenge a prosecutor's allegedly racially motivated use of the peremptory challenge to remove all Black members of the jury panel. The court also upheld the trial judge's finding that defendant had made a prima facie showing that the prosecutor had purposefully discriminated in using the peremptory challenges. In effect, therefore, the court of appeals affirmed the order requiring the prosecutor to explain his use of the peremptory challenge. The state now seeks both review and special action relief from this court, asking us to vacate the order of the trial judge. See Rule 8, Ariz.R.P.Spec.Act., 17A A.R.S., and Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. We decline to do so.

PRESENT STATUS OF THE LAW

At the outset, we reiterate certain basic principles. The law does not permit the state to discriminatorily exclude any "substantial and identifiable class of citizens" from the privilege and obligation of jury service. See Peters v. Kiff, 407 U.S. 493, 503, 92 S.Ct. 2163, 2169 (1972). As Judge Jacobson wrote in the majority opinion for the court of appeals, such an idea is "antithetical to the notion that juries must represent the range of human nature and the variety of human experience." Slip op. at 5, citing Peters. The recent changes in the law worked by Batson and its progeny have thus been more procedural than substantive.

The Batson Court demonstrated this principle by its modification of the holding in Swain v. Alabama, 380 U.S.

202, 85 S.Ct. 824 (1965). In Swain, the Court reaffirmed that the state's purposeful discrimination in jury panel selection violated the equal protection clause of the fourteenth amendment. Swain admonished that

> [f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution ... but is at war with our basic concepts of a democratic society and a representative government.

Id. at 203-04, 85 S.Ct. at 827, quoting Smith v. State of Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165 (1940).

Swain held, however, that there was a presumption that the prosecution had used its peremptory challenge for a permissible reason. The presumption could be overcome only by a showing of systematic exclusion rather than by the state's conduct in a particular case. 380 U.S. at 223, 85 S.Ct. at 837.

However, when Swain was decided, the court had not yet incorporated sixth amendment guarantees into the safeguards afforded by the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968) (sixth amendment first declared binding on states). Thus, the issues raised in Swain involved only the equal protection clause of the fourteenth amendment.

In State v. Wylie, 144 Ariz. 525, 698 P.2d 1244 (1985), this court expressly cited and followed Swain to support our refusal to "[require] an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Wylie, 144 Ariz. at 535, 698 P.2d at 1254. In Wylie, however, the defendant did raise both sixth amendment and equal protection challenges. Defendant argued that his sixth amendment right to a trial

by an impartial jury encompassed the right to be tried by a jury drawn from a fair cross-section of the community. See, e.g., Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029 (1978) (a five-member jury does not adequately represent the community as required by sixth amendment); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986).

We noted in Wylie that the district court in McCray ruled that the right to a representative cross-section in jury composition prohibited the prosecution from using peremptory challenges to exclude an entire ethnic or racial group from the trial jury. Wylie, 144 Ariz. at 535, 698 P.2d at 1254. Nonetheless, we adopted Swain's rule whether the attack

on discriminatory use of the peremptory challenge was based upon equal protection grounds, sixth amendment rights or the identical right guaranteed in art. 2, § 24 of the Arizona Constitution. Wylie, 144 Ariz. at 536, 698 P.2d at 1255. We recognized, however, that the holding was procedural and the state had no substantive right to discriminate against or exclude members of any group. As Justice Cameron stated for the majority:

> We remind the state that the duty of the prosecution is to seek justice, not merely to convict. It is entitled, therefore, not to a jury biased in its favor but to one that will view the evidence fairly and impartially. It should use its peremptory challenges toward this end. In view of the potential harm to this extremely important right [of peremptory challenge], however, we will not look behind the removal of jurors to the prosecutor's reasons for striking them. Rather, we will continue to adhere to the Swain rationale that a defendant is not entitled to a new trial unless he is able to show systematic exclusion of an identifiable group.

Id. at 537, 698 P.2d at 1256 (citations omitted).

Many jurists questioned Swain's applicability to cases in which the sixth amendment was raised. See Perry v. Louisiana, 461 U.S. 961, 103 S.Ct. 2438 (1983); Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) (discriminatory use of peremptory challenges violates sixth amendment), on remand, 801 F.2d 871 (6th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 910 (1987); Wylie, 144 Ariz. at 543, 698 P.2d at 1262 (Feldman, J., specially concurring).

Indeed, even in equal protection cases, Swain's evidentiary requirements did not long prevail. In 1986, Batson overruled the portion of Swain requiring proof of systematic exclusion. The Court held that a defendant could establish a prima facie case for an equal protection violation even though his evidence was

based solely on the prosecutor's exercise of peremptory challenges at that defendant's own trial.

Obviously, subsequent cases have undercut the reasoning in Wylie. Wylie stressed the "importance" of peremptory challenges and the consequent need that "their use should not be impaired or infringed upon." 144 Ariz. at 537, 698 P.2d at 1256. The decision in Batson now permits the very infringements on the use of peremptory challenges that Swain previously prohibited. Thus, we must overrule Wylie. Its attempt to preserve the full reach of the peremptory challenge is now an anachronism which we cannot follow on either federal or state grounds. We hold, therefore, that a prosecutor's racially motivated use of peremptory challenges in a particular case violates the jury guarantee clause of the sixth amendment.

"STANDING"

A. Is the prohibition against discrimination limited only to situations where the defendant and excluded or rejected jurors were of the same race?

The state contends that this defendant, a Caucasian, has no standing to complain of the exclusion of Black veniremen. We disagree with this argument for several reasons.

Defendant argues that under the sixth amendment to the federal constitution his right to an "impartial jury" includes the opportunity to obtain a jury comprising a fair cross-section of the public. This principle is well established. See Ballew, Peters, McCray, Wheeler, Gilmore. Obviously, this right is implicated not only when those rejected for discriminatory motives are members of the defendant's own racial or ethnic group. The discriminatory exclusion of jurors from any cognizable group

necessarily violates the right to a chance for a fair cross-section, no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge or any party to the action. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987); Fields v. People, 732 P.2d 1145 (Colo. 1987); Gilmore, 103 N.J. at 536 n.9, 511 A.2d at 1164 n.9.

The state argues that the explicit language of Batson applies only to those cases in which the excluded jurors and the defendant himself are of the same racial group. This is true.[2] We believe,

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[2] As a result, other jurisdictions have interpreted Batson to require the defendant to be a member of a cognizable racial group and that the prosecution exercise challenges to remove that group's members from his jury. See Smith v. State, 515 So.2d 149 (Ala.Crim.App. 1987); Kibbler v. State, 501 So.2d 76 (Fla.Dist.Ct.App. 1987); Pope v. State, 256 Ga. 189, 345 S.E.2d 831 (1986); Phillips v. State, 496 N.E.2d 87 (Ind. 1986); State v. Christensen, 720 S.W.2d 738 (Mo.App. 1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986).

however, that the language of Batson's holding was aimed at the specific facts and legal issues presented to the Court. Lacking specific guidance from the Supreme Court, we must determine in this case whether the Batson principle applies to situations going beyond Batson's specific facts and to those involving the jury trial guarantee of the sixth amendment.

Arizona provides an illuminating frame of reference. This state has a rich and diverse racial and ethnic composition of Native American, Hispanic, Caucasian, Black, Oriental and other citizens. Throughout Arizona's history, members of a wide variety of racial, ethnic and religious groups have settled in the territory and state, contributing their unique cultures, traditions and views to those of Arizona's indigenous peoples. Both the newcomers and the native peoples of this region have contributed

immeasurably to the growth and development of our state. If we apply the Batson principle exclusively to those cases in which the defendant and the excluded jurors are of the identical racial or ethnic group, our trial judges and lawyers will frequently be forced to inquire into the racial and ethnic makeup of particular jurors. If possible we should adopt the rule that would obviate or reduce the necessity for such an unseemly and intrusive procedure.[3]

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[3] One such case has already come to the attention of this court. In State v. Claborne, No. CV-87-0117-SA, the defendants were Ernest "Bunky" Maestas and John David Maestas. The prosecutor allegedly used peremptory challenges to exclude all Native Americans from a jury which was to try two Hispanic Americans. We declined jurisdiction for procedural reasons, ignoring the very issue raised here. We did not, however, thereby indicate our approval of the concept that our courts should become involved in deciding at what point a Hispanic American becomes a Native American or vice versa. Any rule of law that would make such inquiries relevant to the decision-making process is to be avoided.

B. Trial juries.

Some may argue that the sixth amendment guarantee of an "impartial jury" prohibits the state from discriminating in the selection of the jury panel, but not in the selection of the trial jury. We reject this hypothesis. Any discriminatory exclusion from either the jury panel or the trial jury directly impairs the constitutional right to the opportunity to obtain a jury drawn from a fair cross-section of the community. McCray, 750 F.2d at 1128. In either event, a discriminatory process has skewed the demographic odds and created a racially selected jury. In such cases, the state's discrimination against a "distinctive group" deprives a defendant of the opportunity to obtain a trial jury representing a fair cross-section of the community. See Buchanan v. Kentucky, ____ U.S. ____, ____, 107 S.Ct. 2906, 2913-14 (1987).

The harm done by such state discrimination is not limited to violation of a defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect and further the rights of all citizens.

For these reasons, we believe that the sixth amendment guarantee of an impartial jury forbids the state from discriminating in jury selection, whether before or after the drawing of the names of the veniremen. We therefore adopt a clear, simple rule: under the jury trial clause of the sixth amendment, the state

may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service. See Buchanan. Peters.[4]

This is not to say, of course, that the state is forbidden to exclude any or all members of a cognizable group from the trial jury under any circumstances.

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[4] Of course, the United States Supreme Court may disagree with our view and interpret the sixth amendment guarantee more restrictively than we have in this opinion. In this event, interpretation of the jury trial guarantee contained in art. 2, § 24 of the Arizona Constitution would become determinative. See Deer Valley Unified School District v. Superior Court, No. CV-86-0577-T (Ariz.S.Ct. June 30, 1988). For some reason, neither party to this case has raised, relied on or discussed the Arizona rescript of the federal provision. Thus, this opinion does not reach the question of whether we would interpret art. 2, § 24 of the Arizona Constitution so as to forbid state discrimination through the use of the peremptory challenge. Cf. Deer Valley.

Neither equal protection concepts nor the right to trial by a fair cross-section of the population gives the defendant the right to a trial jury of any particular composition. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975); McCray, 750 F.2d at 1129; Wheeler. The constitution only prohibits the prosecutor from destroying the possibility of a fair cross-section by the discriminatory use of peremptory challenges to exclude jurors because of their membership in an identifiable group. Roman, McCray, Wheeler, Gilmore. The prosecutor is as free as ever to use the peremptory challenges to exclude jurors for nondiscriminatory reasons.

Like the Batson rule, the construction we today give to the sixth amendment is retroactive to those cases not yet final

or pending on direct appeal as of the date of this opinion. See Griffith, 479 U.S. at ____, 107 S.Ct. at 716. Of course, as in the cases presenting the original Batson issue, waiver governs the retroactivity issue. See State v. Holder, 155 Ariz. 83, 745 P.2d 141 (1987) (Batson challenge does not involve fundamental error and was waived absent timely objection).

In the instant case, we conclude, therefore, that the trial judge neither exceeded his jurisdiction nor erred in requiring the county attorney to provide an explanation for the use of peremptories excluding all Black veniremen from the jury.

DEFENDANT'S PRIMA FACIE SHOWING

The state argues, finally, that the defendant failed to make a prima facie showing that the state made

discriminatory use of the peremptory challenges. We agree with the court of appeals' opinion and analysis on this point.

CONCLUSION

We affirm the trial judge's order. We approve the opinion of the court of appeals as supplemented by this opinion and remand this case for further proceedings consistent with this opinion.

STANLEY G. FELDMAN,
Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES DUKE CAMERON, Justice

WILLIAM A. HOLOHAN, Justice

JAMES MOELLER, Justice

APPENDIX B

ORDER OF THE ARIZONA SUPREME COURT

SUPREME COURT

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2866

TELEPHONE (602) 255-4536

September 21, 1988

RE: STATE OF ARIZONA vs. SUPERIOR CT-MARICOPA CO - HON. DANIEL E. NASTRO et al
Supreme Court No. CV-87-0111-PR
Court of Appeals No. 1 CA-SA 025
Maricopa County No. CR-155598

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 20, 1988, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration [Petitioner State of Arizona] = DENIED.

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Hon. Robert K. Corbin, Attorney General
Attn: Timothy C. Holtzen, Esq.

Dean W. Trebesch, Maricopa County Public Defender
Attn: Stephen M.R. Rempe, Esq.
and Mary Lynn Bogle, Esq.

pr

APPENDIX C

OPINION OF THE COURT OF APPEALS

[Filed Jan. 22, 1987]

IN THE COURT OF APPEALS
THE STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, through the Criminal Division of the Attorney General's Office,	)	1 CA-SA 025
	)	DEPARTMENT C
Petitioner,	)	
vs	)	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, HONORABLE DANIEL E. NASTRO, a Judge thereof,	)	OPINION
Respondent Judge,	)	
ELDEN GARDNER,	)	
Real Party in Interest.	)	

Appeal from the Superior Court
of Maricopa County

Cause No. CR-155598

The Honorable Daniel E. Nastro, Judge

REVIEW GRANTED; RELIEF DENIED;
STAY VACATED

Robert K. Corbin Phoenix
Attorney General
by: Tim Holtzen
Criminal Division, Department of Law
Assistant Attorney General
Attorneys for Petitioner

Ross P. Lee, Phoenix
Maricopa County Public Defender
by Mary Lynn Bogle,
Deputy Public Defender
Attorneys for Real Party in Interest

JACOBSON, Judge

This special action filed by the state requires us to determine whether a prosecutor must disclose his reasons for the exercise of peremptory challenges used to strike two black veniremen from a jury panel. Because this is a matter of first impression in this state and is of statewide interest, we accept jurisdiction of the special action.

The state contends the trial court erred: (1) by determining that defendant real party in interest, a caucasian, has made a prima facie showing that the prosecutor engaged in purposeful discrimination; and, (2) by acting arbitrarily and capriciously and thus abusing

his discretion in requiring the prosecutor to disclose reasons for striking the two black veniremen.

Elden Gardner, defendant real party in interest, was indicted on February 25, 1986 and charged with one count of leaving the scene of a fatal accident, a class 6 felony. His trial before respondent Judge Daniel E. Nastro began on September 24, 1986. Defendant is caucasian. He is being represented by a black attorney from the Office of the Public Defender.

During jury selection, the prosecutor exercised two peremptory challenges that resulted in the striking of the only two black veniremen present. The defendant objected to this use of the state's peremptory challenges. Based on the objection, a hearing was conducted in chambers at which Judge Nastro requested that the state disclose its reasons for the exercise of the peremptory challenges to exclude blacks from the panel. Judge Nastro

based his request on Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The state refused to comply and sought special action relief in this court. The proceedings on stipulation were stayed pending our decision on the state's petition.

The state's argument is essentially two-fold. It first contends that defendant does not have standing to object to striking members of the jury panel who are not of the same race as the defendant. The state contends that Batson, supra, mandates that the defendant must first show that he is a member of a racial group capable of being singled out for differential treatment, and that the peremptory challenges at issue were exercised against members of defendant's race. Because defendant is white, it is urged, he has no standing to contend that his rights have been violated by the exclusion of blacks from the jury panel.

The second prong of the state's argument under Batson is that because defendant is white, the trial court abused its discretion in requiring the prosecutor to disclose reasons for the challenges because the defendant is unable to make a prima facie showing that the prosecutor is engaging in purposeful discrimination. We disagree with both arguments.

Prior to the decision in Batson, the law dealing with purposeful discrimination in the selection of jurors was defined by Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Swain required the defendant to demonstrate that the state systematically excluded an identifiable group from jury service. 380 U.S. at 224, 85 S.Ct. at 838, 13 L.Ed.2d at 775, see State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985). As a result, proof of the repeated striking of blacks over several cases was necessary to establish a violation by the state of the defendant's right to equal protection.

Batson, supra at n. 10. This "evidentiary formulation" insulated the prosecutors' use of peremptory challenges from constitutional scrutiny. 476 U.S. at ___, 106 S.Ct. at 1720, 90 L.Ed.2d at 84. Illustrative of this insulation is the Arizona Supreme Court decision in State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985), which held that absent a showing of systematic exclusion, there was no constitutional requirement that the trial judge investigate the prosecutor's reasons for his exercise of peremptory challenges. 144 Ariz. at 537, 698 P.2d at 1256.

Batson overrules that portion of Swain which requires the showing of systematic exclusion. 476 U.S. at ___, 106 S.Ct. at 1720, 90 L.Ed.2d at 85. Other than a decision by the Court of Appeals, Division 2, which holds that Batson may not be applied retroactively, no Arizona appellate court has reviewed the substantive application of the Batson standard. Accordingly, the issues before us are of first impression.

We examine first the state's argument that a white defendant has no standing to object to the peremptory exclusion of black veniremen.

In our opinion the standing issue is controlled by Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972) (plurality opinion) where the United States Supreme Court first examined the problem posed by a white defendant's challenge to the exclusion of blacks from jury service. In Peters, decided under Swain, a white defendant alleged that blacks were being systematically excluded from the grand jury which indicted him, and from the petit jury which convicted him of burglary. The court found that the race of the defendant did not preclude him from gaining standing to challenge the exclusion of blacks. Peters indicated that exclusion from jury service by the state of a "substantial and identifiable class of citizens" is antithetical to the notion that juries must represent the range

of human nature and the variety of human experience. See 407 U.S. at 504, 92 S.Ct. at 2169, 33 L.Ed.2d at 95. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (male defendant held to have standing to challenge exclusion of women from jury service); People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978). To demonstrate this point, the Court held that:

> [w]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

407 U.S. at 504, 92 S.Ct. at 2169, 33 L.Ed.2d at 95.

The state bases its standing argument on the language in Batson, supra, which requires a defendant to be of the same race as the veniremen being excluded. In our opinion the "same class" language of Batson, goes not to the issue of standing (right to use the issue), but is directed

only toward the establishment of a prima facie evidentiary case of purposeful discrimination. Thus, if the defendant and excluded veniremen are of the same race, a strong evidentiary inference may be drawn that prima facie purposeful discrimination has occurred and the burden thereby shifted to the state to explain its actions.

We are supported in this view by the prima facie burden of proof rules established in the "disparate treatment" causes under Title VII of the Civil Rights Act of 1964. Batson, supra, at n. 18. The seminal case is McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). McDonnell Douglas held that the party alleging disparate treatment may make out a prima facie case by showing first that he or she is a member of a "racial minority." However, this premise is qualified in a footnote:

> [t]he facts necessary will vary in a Title VII case, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corp. v. Green, supra, at n. 13. The qualification was made law in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) where white employees of the defendant were held to have made a prima facie case of racial discrimination, even though they were not members of a "racial minority." 427 U.S. at 278, 96 S.Ct. at 2578, 49 L.Ed.2d at 500. Referring with approval to the language cited above from McDonnell Douglas, the Court noted that:

> [r]equirement (1) of this sample pattern of proof was set out only to demonstrate how the racial discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination.

McDonald v. Santa Fe Trail Transportation Co., supra, at n. 6.

Given the continuing line of cases which reject the so-called "same class rule," we reject a reading of Batson, supra, that would require that defendant Gardner be of the same race as the stricken jurors to have standing to object.

We turn now to the second prong of the state's argument - that defendant is unable to make a prima facie showing that the prosecutor engaged in purposeful discrimination by his exercise of the peremptory challenges. Again, the state, in our opinion, mistakenly premises the argument on a reading of Batson that requires the defendant to be of the same race as the excluded veniremen.[1]

1/ But see Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986); State v. Christensen, No. SD-36803 (Mo. App. 1986). Both Pope and Christensen hold that a white defendant cannot establish a prima facie case if not a member of a cognizable racial group. For the reasons discussed in this opinion, we refuse to follow these cases.

Petitioner relies on the language in Batson which states that to establish a prima facie case of purposeful discrimination in selection of the petit jury:

> the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.

476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 87.

We agree, as evidenced by our previous discussion, that the above quoted language provides the trial judge with a strong basis for finding a prima facie case of purposeful discrimination. We do not agree that this "same-class" criteria is the exclusive test to determine whether purposeful discrimination has occurred. In Batson, the Supreme Court indicated that the trial judge, in addition to the "same class" factor, was to consider "any other relevant

circumstances [which] raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Id. at 1723. See Clark v. City of Bridgeport, ____ F. Supp. ____, Div. Nos. B-83-514 (TFGD), B-86-119 (TFGD), B-86-116 (TFGD) (Dist. Conn. 1986); Wilder v. State, ____ N.E.2d ____, No. 71A03 8605-CR-150 (Ind. App. 1986).

From our reading of Batson, it is clear that the initial burden is upon the trial judge to make the discretionary determination as to whether there is sufficient evidence of purposeful discrimination in the peremptory striking of veniremen to require explanation by the prosecution for its actions. 476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. In this regard, the Court stated:

> [i]n deciding whether the defendant has made the requisite showing, the trial court should

> consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenge may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's peremptory challenges creates a prima facie case of discrimination against black jurors.

476 U.S. at ___, 106 S.Ct, at 1723, 90 L.Ed.2d at 88.

Given the broad discretion afforded the trial judge in these circumstances, we find neither arbitrary or capricious action by the respondent trial judge, nor any abuse of his discretion. We, of course, express no opinion as to whether any explanation of the prosecution for its actions would justify a nonracial reason for the exercise of the peremptory challenges in this case. Accordingly, we

exercise our discretion in granting jurisdiction of this special action, but deny relief. The stay previously issued in this matter is vacated.

/S/
Eino M. Jacobson, Judge

CONCURRING:

/S/
Bruce E. Meyerson, Presiding Judge

SHELLEY, Judge, dissenting:

I respectfully dissent. In my opinion, a white defendant normally does not have standing to contest the use of peremptory challenges to strike the only blacks from a jury. However, because this defendant is represented by a black attorney, the fact situation is sufficient to satisfy the principles set forth in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The majority mistakenly holds that the standing issue is controlled by Peters v.

Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). In that case, peremptory challenges were not involved. The case involved the systematic exclusion of blacks from being initially drawn for grand and petit juries. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the jurors were excluded from the venire. Peremptory challenges were not involved.

Batson makes it clear that the prosecutor's historical privilege of peremptory challenges should be as free from judicial control as possible. This right is deeply rooted and comes from common law. Batson held that if a prosecutor was required to explain his reasons for exercising peremptory challenges, that explanation did not need to rise to the level justifying challenge for cause. The question to be determined was whether the peremptories made were based solely on the

prosecutor's intuitive judgment that they would be partial to the defendant because of their shared race. The Batson case held:

> The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.
>
> * * *
>
> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. (Emphasis added - citations omitted)

____ U.S. at ____, 106 S.Ct. at 1722-23, 90 L.Ed.2d at 87-88.

In the case of Phillips v. State, ____ Ind. ____, 496 N.E.2d 87 (1986), the Indiana Supreme Court, referring to Batson, stated:

> To establish such a case, appellant must show: 1) he is a member of a cognizable racial group; 2) the prosecutor has exercised peremptory challenges to remove that group's members from his jury; and 3) the facts and circumstances of his case raise an inference the exclusion was based on race. Batson, supra. Once appellant has made a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor's explanation need not rise to the level of a challenge for cause. The trial court will then have the duty to determine whether appellant has established purposeful discrimination. (Emphasis added)

Id. at ____, 496 N.E.2d at 89.

Phillips interprets Batson to require that the defendant must be a member of a cognizable racial group and that the prosecutor has exercised challenges to remove that group's members from his jury.

In State v. Jackson, ____ N.C. ____, 343 S.E.2d 814 (1986), the court interpreted Batson as follows:

> The Court stated that in order to establish such a prima facie case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that lends itself to potential abuse; and third, the defendant must show that these facts and any other relevant circumstances (e.g., a pattern of strikes against black jurors in a particular voir dire, questions and statements by the prosecutor during voir dire, etc.) raise an inference that the prosecutor used peremptory challenges to exclude prospective jurors on the basis of race. (Emphasis added)

Id. at ____, 343 S.E.2d at 820.

The reasoning in Phillips and Jackson is entirely consistent with the holding in Batson.

The majority states:

> The state bases its standing argument on the language in

> Batson, supra, which requires a defendant to be of the same race as the veniremen being excluded. In our opinion the "same class" language of Batson, goes not to the issue of standing (right to use the issue), but is directed only toward the establishment of a prima facie evidentiary case of purposeful discrimination. Thus, if the defendant and excluded veniremen are of the same race, a strong evidentiary inference may be drawn that prima facie purposeful discrimination has occurred and the burden thereby shifted to the state to explain its actions.

I disagree. Batson clearly states unequivocally that the defendant first must show that he is a member of a cognizable racial group and second that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The foregoing is the threshold requirement. If the first requirement is not met, then it is not necessary to consider the remaining two requirements specified in Batson.

The United States Supreme Court cases cited by the majority are all pre-Batson determinations. Batson is therefore controlling on this issue.

The cases cited by the majority involving U.S.C. Title VII are inapposite, inasmuch as they involve statutory interpretation and not constitutional rights.

A defendant has the right to have an attorney of his choosing, or if indigent, a right to have an attorney appointed by proper authorities. Since this defendant has a black attorney to present his case to the jury, the principles of Batson apply to this defendant as if he were black. He has standing to contest the use of peremptory challenges.

The majority states that under Batson, the initial burden is upon the trial judge to make his discretionary determination "as to whether there is sufficient evidence of purposeful

discrimination in the peremptory striking of veniremen to require explanation by the prosecution for its actions." The majority quotes the following from Batson:

> [i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenge may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's peremptory challenges creates a prima facie case of discrimination against black jurors.

We are therefore required to look at the relevant circumstances including voir dire to determine whether or not the trial court abused its discretion in finding that an inference of discrimination was raised sufficient to

require the prosecutor to give an explanation. In this connection, the record shows the following statement by the trial court referring to one of the two black jurors stricken: "I know he did say, I believe he had a past history, a felony for aggravated assault, or assault, and probation and if my memory serves me correct, he said it was five years ago." The court further stated: "Since both were black, I necessarily have to ask as to both blacks."

It is clear that the trial court made this ruling solely on the basis of the racial exclusion by peremptories without taking into consideration the circumstances revealed on voir dire. In my opinion, the trial court abused its discretion in requiring the prosecutor to respond with respect to the striking of this one juror.

I find no abuse of discretion in requiring the prosecutor to give the

reason for striking the other black juror. The judgment of the trial court should be affirmed with respect only to requiring an explanation with regard to one black juror.

/S/
MELVYN T. SHELLEY, JUDGE

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1037 No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term of 1988

No. 88-_____

STATE OF ARIZONA,

Petitioner,

vs.

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

DEAN W. TREBESCH
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Attorney for Real Party in Interest
(Application for Admission submitted and pending)

QUESTION PRESENTED

When a white defendant is represented by black counsel, do the Fourteenth Amendment equal protection guarantees of Batson v. Kentucky and the Sixth Amendment right to an impartial jury require the prosecutor to explain his peremptory strikes of the only black veniremen on the panel?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT I 4

ARGUMENT II 6

CONCLUSION 7

TABLE OF AUTHORITIES

	Pages
Ballard v. United States 329 U.S. 187 67 S.Ct. 261 91 L.Ed. 181 (1946)	6
Ballew v. Georgia 435 U.S. 223 98 S.Ct. 1029 55 L.Ed.2d 234 (1978)	6
Batson v. Kentucky 476 U.S. 79 106 S.Ct. 1712 90 L.Ed.2d 69 (1986)	1,3,4,5,7
Lockhart v. McCree 476 U.S. 162 106 S.Ct. 1758 90 L.Ed.2d 137 (1986)	4
Nevius v. Sumner 852 F.2d 463 (9th Cir. 1988)	5
People v. Rousseau 129 Cal.App.3d 526 179 Cal.Rptr. 892 (App. 1982)	3
Peters v. Kiff 407 U.S. 493 92 S.Ct. 2163 33 L.Ed.2d 83 (1972)	4,5
Teague v. Lane 820 F.2d 832 (7th Cir. 1987), cert.granted ___ U.S. ___ 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term 1987 No. 87-5259)	4
State v. Superior Court (Maricopa County) 156 Ariz. 512 753 P.2d 1168 (App. 1987)	1
State v. Superior Court in and for Maricopa County ___ Ariz. ___ 760 P.2d 541 (1988)	1
United States v. Chavez-Vernaza 844 F.2d 1368 (9th Cir. 1987)	5
United States v. Vaccaro 816 P.2d 443 (9th Cir. 1987)	5
United States Constitution Sixth Amendment Fourteenth Amendment	 1,2,4,6,7 2,5,6,7

OPINIONS BELOW

The Arizona Court of Appeals held that, pursuant to Batson v. Kentucky,[1] a prima facie showing of purposeful discrimination was made when the prosecutor peremptorily struck both black veniremen from the jury of a white defendant who was represented by a black lawyer; it was, therefore, incumbent upon the prosecutor to articulate racially neutral reasons for these peremptory strikes. State v. Superior Court (Maricopa County), 156 Ariz. 512, 753 P.2d 1168 (App. 1987).

The Arizona Supreme Court affirmed the decision of the Court of Appeals and held further that, under the jury trial clause of the Sixth Amendment, the State may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privileges and obligations of jury service. State v. Superior Court in and for Maricopa County, ___ Ariz. ___, 760 P.2d 541 (1988).

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

STATEMENT OF THE CASE

Real Party in Interest Elden Gardner adopts the Statement of the Case set forth in the Petition for Writ of Certiorari with the exception that, contrary to the assertion in footnote 3, the record is clear that the trial judge Daniel E. Nastro concluded that a prima facie showing of racial discrimination had been made based upon the decision in Batson v. Kentucky. In deciding whether a prima facie showing had been made, Judge Nastro analyzed the relevant circumstances by referring to factors set forth in People v. Rousseau, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (App. 1982). As noted by the Arizona Court of Appeals, Judge Nastro based his request for a racially neutral explanation on Batson.

ARGUMENT I.

THE TRIAL COURT'S DECISION WAS IN ACCORDANCE WITH THE DICTATES OF THE EQUAL PROTECTION CLAUSE.

The trial judge correctly decided that Batson v. Kentucky required the prosecutor to explain his peremptory strikes of the only two black venire members. The trial judge considered all relevant circumstances, including the fact that this white defendant had a black lawyer, when he concluded that the defense had shown a prima facie case of discrimination against black jurors.

The State of Arizona claims that an "identical or similar" question is pending before this Court in Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert.granted, ____ U.S. ____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term 1987 No. 87-5259). Teague is not "identical," nor is it "similar." Teague, who had a white lawyer, did not claim that his Batson rights had been violated. Teague's claim was based solely on the Sixth Amendment. This Court did not address the Sixth Amendment issue in Batson although Batson had made his claim pursuant to the Sixth Amendment. Therefore, the case "similar" to Teague is Batson, not the instant case. Further, the citation to Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) is inapposite. Lockhart involved removal for cause of "Witherspoon-excludables" (those opposing the death penalty). Lockhart held that juries need not "mirror" the community. The Arizona Supreme Court [here] agreed. Moreover, in Lockhart, this Court carefully distinguished "death qualification" from the wholesale exclusion of blacks, women, or Mexican-Americans.

Citing to Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), the Arizona Court of Appeals and the Arizona Supreme Court set forth the "basic principle" that the law does not permit the State to discriminatorily exclude any substantial and identifiable class of citizens from the privilege and obligation of jury service. Peters v. Kiff, was an equal protection case. Peters, a white man, had standing to attack the systematic

exclusion of Negroes from grand jury and petit jury service. Given the rationale of Peters v. Kiff, the Arizona Supreme Court opined that the recent changes in the law worked by Batson and its progeny are more procedural than substantive.

The three Ninth Circuit decisions cited by the State are not in conflict with the Arizona Supreme Court in the instant case. In United States v. Vaccaro, 816 P.2d 443 (9th Cir. 1987), the Circuit Court held that striking two black jurors did not constitute a pattern of discrimination; however, even if it did, the prosecution had expressed a neutral, reasonable basis for its challenges. Further, the relevant circumstance of representation by a black attorney was not present in the Vaccaro case. In United States v. Chavez-Vernaza, 844 F.2d 1368 (9th Cir. 1987), Chavez, who is not black and who did not have a black lawyer, failed to make a prima facie case of discrimination and did not satisfy the Batson requirement that the excluded jurors be members of his race. Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988) involved a black defendant who had challenged the exclusion of all four blacks and two Hispanics from his jury. The circuit court held that Nevius' Fourteenth Amendment claim was precluded because the Batson rule is not retroactive.

In the eyes of the jury, lawyer and client are as one. Here, however, the prosecutor prevented Elden Gardner and his lawyer from enjoying those same rights a black defendant has under Batson. Equal protection does not presume to disadvantage any man because of the color of his appointed lawyer.

ARGUMENT II.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION COMPELS THE RESULT REACHED BY THE ARIZONA COURTS.

The Sixth Amendment to the United States Constitution guarantees the right to an "impartial jury" comprised of a fair cross-section of the public. Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978); Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946). This right prohibits the State from discriminating in the selection of the jury venire and in the selection of the trial jury. The focus thus shifts from the defendant to the prospective jury.[2]

In its decision, the Arizona Supreme Court observed that neither Fourteenth Amendment equal protection nor the Sixth Amendment right to trial by a fair cross-section of the population gives the defendant the right to a trial jury of any particular composition. However, the Arizona Supreme Court emphasized that State discrimination against a distinctive group deprives a defendant of the opportunity to obtain a trial jury representing a fair cross-section of the community. The Arizona court properly adopted what it described as a "clear, simple rule: Under the jury trial clause of the Sixth Amendment, the State may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service." The application of this rule to the instant case was in accord with the dictates of the Sixth Amendment to the United States Constitution.

---

[2]"The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces 'injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' " McCray v. New York, 461 U.S. 961, 968, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1322 (1983) (Marshall, J. dissenting from denial of certiorari and citing to Ballard v. United States, supra, in which this court reversed for exclusion of women from the jury panel.) See also: Marshall, J. dissent in Allen v. Hardy, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986).

CONCLUSION

Under the narrowest reading of Batson v. Kentucky, the Arizona courts correctly applied the Batson rationale to this white defendant whose lawyer was black and from whose jury all blacks had been peremptorily excluded by the State. Moreover, the Sixth Amendment right to an impartial jury compelled the conclusion reached by the Arizona Courts.

Contrary to petitioner's assertion, enforcement of Fourteenth Amendment and Sixth Amendment rights will not sound the death knell for the peremptory challenge. Batson requires from the defendant a prima facie showing, failing which an explanation is not required. It is only the discriminatory use of the peremptory challenge which must be addressed. However, should enforcement of constitutional rights undermine the peremptory challenge, it is the peremptory challenge which must give way.[3]

The State's Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17 day of January, 1989.

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[3]See discussion in State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (NJ 1986).

Supreme Court, U.S.
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FEB 11 1989
JOSEPH F. SPANIOL, JR.
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NO. 88-1037

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

When the defendant is white and his attorney is black, does the Sixth Amendment right to an impartial jury and Batson v. Kentucky, require a prosecutor to explain his peremptory strikes of the only two black veniremen?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
ARGUMENTS	
I	
AN IDENTICAL OR SIMILAR QUESTION IS PENDING BEFORE THIS COURT.	1
II	
THERE IS A CONFLICT BETWEEN THE DECISIONS OF THE COURT OF APPEALS, AND THE HIGHEST STATE COURT WITH THE SAME TERRITORIAL JURISDICTION.	2
CONCLUSION	4
CERTIFICATION	6
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF CASES AND AUTHORITIES

Case	Page
Batson v. Kentucky 476 U.S. 79 106 S.Ct. 1712 90 L.Ed.2d 69 (1986)	2
Nevius v. Sumner 852 F.2d 463 (9th Cir. 1988)	4
Teague v. Lane 820 F.2d 832 (7th Cir. 1988)	1,4
United States v. Chavez-Vernaza 844 F.2d 1368 (9th Cir. 1987)	3
United States v. Vaccaro 816 F.2d 443 (9th Cir. 1987)	3
United States Constitution Sixth Amendment Fourteen Amendment	1,2

ARGUMENTS

I

AN IDENTICAL OR SIMILAR QUESTION IS PENDING BEFORE THIS COURT.

Petitioner submitted that this Court is presently considering an identical or similar issue of whether the Sixth Amendment right to a trial by an impartial jury compels explanation of peremptory challenges that exclude a distinctive group. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert. granted, ____U.S.____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term, 1987, No. 87-5259). Respondent argues that Teague is not "identical," nor is it "similar." The precise question presented by Teague is "whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement." (Appendix A at A-3; see

also Appendix B at B-3.) Since the Arizona Supreme Court held that the Sixth Amendment jury guarantee clause permits the trial court to compel explanations for the prosecutor's use of peremptory strikes, the issue is identical or similar. Petitioner does not contend that the issue is similar to the holding in the Arizona Court of Appeals opinion, which was limited to the issue of Batson v. Kentucky[1] and the equal protection clause of the Fourteen Amendment.

II

THERE IS A CONFLICT BETWEEN THE DECISIONS OF THE COURT OF APPEALS, AND THE HIGHEST STATE COURT WITH THE SAME TERRITORIAL JURISDICTION.

Respondent argues that there is no conflict between the Ninth Circuit and the Arizona opinions. While the Arizona Court of Appeals held that a Caucasian

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1. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

has standing and can make a prima facie showing of discrimitory use of peremptory challenges with black veniremen, the Ninth Circuit clearly stated:

> Neither the Vaccaros nor Snider are black. Therefore, under Batson, they could not have made out a prima facie case of discrimination in jury selection in any event.

United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987).

> The government argues that because it did not use its peremptory challenges to "remove from the venire members of the defendant's race," Chavez failed to establish a prima facie case of discrimination under Batson. We agree. . . . Chavez failed to satisfy these preliminary requirements because he did not show that the excluded jurors were members of his race.

United States v. Chavez-Vernaza, 844 F.2d 1368, 1376 (9th Cir. 1987) (citation omitted, emphasis added).

Finally, although the Arizona Supreme Court held that the Sixth Amendment

applies to the discriminatory use of peremptory challenges that exclude any substantial and identifiable class of citizens from the petit jury, 3 days later the Ninth Circuit held:

> [The sixth amendment] fair cross-section requirement applies only to the larger venire pool and not to the petit jury. . . . Nevius' sixth amendment claim therefore must fail because he does not allege discrimination in the selection of the venire.

Nevius v. Sumner, 852 F.2d 463, 466 (9th Cir. 1988).

CONCLUSION

There is an identical or similar issue of the Sixth Amendment jury guarantee clause pending before this Court in Teague v. Lane.

There are conflicts between the decisions of the Ninth Circuit and the highest state court with the same territorial jurisdiction. For all the

reasons set forth in the petition for writ of certiorari and those contained herein, the petitioner requests that this Court accept the petition for writ of certiorari and review the conjoined opinions of the Arizona Supreme Court and the Arizona Court of Appeals.

DATED this 9th day of February, 1989.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TIMOTHY C. HOLTZEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari, upon Carol Carrigan, Deputy Public Defender, 132 South Central, 2nd Floor, Phoenix, Arizona, 85004, attorney for Elden Gardner, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Additionally, as a courtesy, he herewith certifies that service of one copy of this petition has been made upon the Honorable Daniel E. Nastro, Judge of the Maricopa County Superior Court, 101 West Jefferson, #612, Phoenix, Arizona 85003-0000, by depositing the same in the United States Mail, with first class postage prepaid.

DATED this 9th day of February, 1989.

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SUBSCRIBED AND SWORN to before me this 9th day of February, 1989.

Marguerite A. Potter

MARGUERITE A. POTTER
NOTARY PUBLIC

My Commission Expires:

September 22, 1989

CRM86-0631
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APPENDIX A

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director,
Illinois Department of Corrections,
et al.

Respondents,

On Writ Of Certiorari To The United States
Court Of Appeals For the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement.

Whether, consistent with Justice Harlan's view of retroactivity, Batson v. Kentucky should at a minimum be applied retroactively to all convictions not final when certiorari was denied in McCray v. New York.

Whether Swain v. Alabama permits the prosecution's volunteered reasons for its exercise of its peremptory challenges to be examined to determine if it has engaged in racial discrimination.

APPENDIX B

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director
Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of the representative cross-section principle to the petit jury so as to restrict the use of peremptory challenges is unworkable and unsound?

2. For purposes of the retroactivity doctrine, should the date of the announcement of a new rule of constitutional law be the controlling event, rather than some preceeding [sic] event, and is the retroactive application of the rule of Batson v. Kentucky to cases in which the conviction became final before the decision unwarranted?

3. Is petitioner barred by procedural default from pressing his argument that a violation of Swain v. Alabama is shown on the record in this case, and if not, does Swain permit the use of peremptory

challenges to excuse members of a cognizable racial group for trial-related reasons in an individual case where the defendant is a member of the group?

"

Supreme Court, U.S.
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No. 88-1037

In The

Supreme Court of the United States

October Term, 1988

STATE OF ARIZONA,

Petitioner,

vs.

HONORABLE DANIEL E. NASTRO,
a judge of the Superior Court of the State of Arizona,
in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest.

On Writ of Certiorari to the
Arizona Supreme Court

SUPPLEMENTAL BRIEF TO THE PEITITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
SUPPLEMENTAL BRIEF OF PETITIONER	1
I. Summary Of Issues Presented In Petition.	2
II. The Questions Presented In Holland v. Illinois Will Not Resolve The Issues Presented In This Case.	5
III. The Issues Presented In This Case Were Not Resolved In Teague v. Lane.	7
IV. The Unresolved Conflict Presents An Important Issue For Review In This Case.	10
CONCLUSION	16
APPENDIX: Opinion in Torres v. State of Florida (Fla.App. 2d Dist., February 1, 1989)	A-1
CERTIFICATE OF SERVICE (Follows Appendix)	

TABLE OF CASES AND AUTHORITIES

Cases	Page
Batson v. Kentucky 476 U.S. 79 (1986)	2, passim
Gov't of Virgin Islands v. Forte 865 F.2d 59 (3rd Cir. 1989)	15
Holland v. Illinois No. 88-5050 57 L.W. 3570	5,6,7,8,13,14,16
Kibler v. State 501 So.2d 76 (Fla.App. 1987)	13
People v. Crowder 161 Ill.App.3d 1009 515 N.E.2d 783 (Ill.App. 1987)	13
People v. Holland 121 Ill.2d 136 520 N.E.2d 270 (Ill. 1988)	13
Pope v. State 256 Ga. 196 345 S.E.2d 831 (Ga. 1986)	12
Pope v. United States 372 F.2d 710 (8th Cir. 1967)	14
Seubert v. State 749 S.W.2d 585 (Tex.App. 1988)	15

Smith v. State
516 So.2d 149
(Ala.Crim.App. 1987) 13

State v. Christensen
720 S.W.2d 738
(Mo.App. 1986) 13

State v. Hall
751 P.2d 701
(N.M.App. 1987) 13

State v. Jackson
317 N.C. 1
343 S.E.2d 814
(N.C. 1986) 14

State v. Superior Court
157 Ariz. 541
760 P.2d 541 (1988) 4,5

State v. Superior Court
156 Ariz. 512
753 P.2d 1168
(Ariz.App. 1987) 10

Teague v. Lane
____U.S.____
57 L.W. 4233
(Feb. 22, 1989) 8,9,16

Torres v. State of Florida
____So.2d____
1989 Fla.App. LEXIS 462
Appendix A
(Fla.App., Feb. 1, 1989) 11

United States v. Biaggi
853 F.2d 89
(2d Cir. 1988) 14

United States v. Chavez-Vernaza
844 F.2d 1368
(9th Cir. 1987) 12

United States v. Hamilton
850 F.2d 1038
(4th Cir. 1988) 12

United States v. Townsley
856 F.2d 1189
(8th Cir. 1988) 12

United States v. Vaccaro
816 F.2d 443
(9th Cir. 1987) 12

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In The

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STATE OF ARIZONA,

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HONORABLE DANIEL E. NASTRO,
a judge of the Superior Court of the State of Arizona,
in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest.

SUPPLEMENTAL BRIEF TO THE PEITITION FOR A WRIT OF CERTIORARI

This Supplemental Brief of Petitioner discusses new cases and intervening matter not available at the time the Petition was filed by the State of Arizona on December 17, 1988.

I. Summary Of Issues Presented In Petition.

The State of Arizona is petitioning this Court to review the primary question of whether a white defendant, who has a black defense attorney, may challenge the state's use of its peremptory strikes in trial jury selection, and require the prosecutor to justify such strikes, under the Sixth Amendment or Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69, 87 (1986).

The State of Arizona maintains that Batson restricted itself to a remedy for racial discrimination under the Equal Protection Clause and provided a limited intrusion into the "historical privilege of peremptory challenge free of judicial control". 476 U.S. at 91. Batson relaxed the burden of proof required for a defendant to require disclosure by the state when the court finds the state

discriminated against a black defendant and intentionally tried "to exclude members of his race from the petit jury". Id. at 82.

The trial prosecutor in the instant case relied upon the limited scope of Batson when he objected to the Respondent trial judge's decision that a disclosure of justification be made after the prosecutor peremptorily struck the second of two black venire members from the jury panel in a trial of a white defendant.

The Arizona Supreme Court did not decide simply that the rule of Batson extends to white defendants. Instead, the Court below ruled that standing under Batson was not limited to "same-race" defendants and that the Sixth Amendment guarantees any defendant of any race the right to challenge the state's strikes against jurors of any race or class. The Arizona Supreme Court, interpreting only

federal law (and excluding consideration of state law at this point), announced a new and all inclusive rule:

> We therefore adopt a clear, simple rule: under the jury trial clause of the sixth amendment, the state may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service.

[This rule appears at pp. A-18-19 of the opinion of the Arizona Supreme Court, in Appendix A to the Petition, reported as State v. Superior Court, 157 Ariz. 541, at 546, 760 P.2d 541, 546 (1988).]

The Arizona Supreme Court held that the fair cross-section right extends to both the jury panel and the trial jury. The Court below reasoned that exclusion of any class violates a defendant's constitutional rights and deprives minorities of the opportunity for jury service, infringing on their privileges of citizenship, and further that

exclusion creates a perception that the "criminal justice system is imposed on certain minorities rather than operating to protect and further the rights of all citizens". State v. Superior Court, 157 Ariz. at 545-46, 760 P.2d at 545-46, Appendix A to Petition at A-18.

II. The Questions Presented In Holland v. Illinois Will Not Resolve The Issues Presented In This Case.

On February 27, 1989, this Court granted unrestricted certiorari in Holland v. Illinois, No. 88-5050, 57 L.W. 3570, which presented two questions for review:

1. Whether the state's use of peremptory challenges to remove black prospective jurors on grounds of race violate the Sixth Amendment right to trial by jury.

2. Whether petitioner, a white man, has standing to challenge, as violative of that constitutional right, the removal by the prosecutors of black prospective jurors from the jury in petitioner's case.

The Petition in Holland is not based on the "same-race" limitation of Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87 (1986). The Holland Petition does not present whether the Batson rule should be extended to allow standing by white defendants nor that Batson does not restrict standing by white defendants. Rather, the Holland Petition argues that the Sixth Amendment prohibits improperly excluding black venire members through peremptory challenges by the prosecution. The oral argument in Holland v. Illinois is presently set for the October, 1989, term.

The question of whether the Equal Protection remedy of Batson applies to all races and classes of defendants and all races and classes of trial jurors under the Sixth Amendment is not before the Court. The resolution of these

issues is squarely presented in the decision of the Arizona Supreme Court below.

The State of Arizona in the instant Petition maintains that Batson, supra, limited standing to "same-race" defendants, and that white defendants, even with a black defense attorney, cannot make a prima facie case of racial discrimination on the basis of peremptory challenges of black venire members. Having granted review to the Sixth Amendment issue in Holland, this Petitioner submits that review should be granted to the broader Sixth Amendment and Batson Equal Protection issues presented herein.

III. The Issues Presented In This Case Were Not Resolved In Teague v. Lane.

At the time this Petition was filed in December of 1988, this Court was considering a black defendant's challenge

to a prosecutor's strikes of black jurors, presented in the Petition of Frank Teague against Illinois prison Director Michael Lane, No. 87-5259. This Court has resolved Teague v. Lane, ___ U.S.____ (Feb. 22, 1989), without deciding the question of whether the Sixth Amendment, or only the Equal Protection Clause, gives a defendant the right to challenge the state's peremptory strikes at trial. The State of Arizona seeks review of these questions in this case.

In light of the disposition in Teague and the limited question before the Court in Holland, the State of Arizona will not obtain resolution of these issues for this instant case, or any other cases in Arizona in the future, without a grant of certiorari on this Petition and reversal by this Court.

The basis for this Court's decision in Teague illustrates the error in the analysis of the issue by the Arizona Supreme Court. In Teague v. Lane, ___ U.S.____, 57 L.W. 4233, at 4239-40 (Feb. 22, 1989), this Court stated that the fair cross-section requirement of the Sixth Amendment does not involve a "bedrock procedural element" which would "undermine the fundamental fairness" that is "implicit in the concept of ordered liberty".

In contrast, the Court below elevated the importance of a trial jury representative of all segments of the community to a central position in the judicial system. This removed the legitimate use and scope of peremptory challenges from the prosecution.

The State of Arizona maintains that the prosecution's right to peremptory challenges at trial should not be

violated by extending to all defendants the procedural remedy of Batson. This essential trial issue deserves resolution at this time.

IV. The Unresolved Conflict Presents An Important Issue For Review In This Case.

Another reason for granting review in this case is the conflict between the decision below and those of other state and federal courts. In this case, the white defendant was represented by a black defense attorney. Although the broad rule created by the Arizona Supreme Court did not make the lawyer a relevant factor, one judge of the Arizona Court of Appeals stated that "the principles of Batson apply to this defendant as if he were black" because the white defendant had a black attorney. State v. Superior Court, 156 Ariz. 512, at 518, 753 P.2d 1168, at 1174 (Ariz.App. 1987),

Appendix C to Petition at C-21 (Shelley, J., dissenting).

In the recent case of Torres v. State of Florida, ____So.2d____, 1989 Fla.App. LEXIS 462 (Fla.App. 2d Dist., Feb. 1, 1989) (copy in Appendix hereto at A-1 to A-12), a white defendant with a black defense lawyer sought the remedy of Batson and the Florida Court of Appeal held that the white defendant, even with a black lawyer, had no standing to challenge the state's peremptories. The Court of Appeal certified the Batson issue to the Florida Supreme Court. (See: Torres, at A-8, infra.)

Both the Florida Court of Appeal in Torres and the Arizona Supreme Court in this case acknowledged the weight of authority among the other states and federal courts to deny standing under the Equal Protection Clause and to deny Batson-type relief under the Sixth

Amendment. See for example: United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), cert. denied, ____U.S.____, 108 S.Ct. 295, 98 L.Ed.2d 255 (1987) (white defendants cannot challenge black juror strikes); United States v. Chavez-Vernaza, 844 F.2d 1368, 1376 (9th Cir. 1987) (Hispanic defendants cannot challenge black juror strikes); United States v. Townsley, 856 F.2d 1189, 1191 (8th Cir. 1988) (neither Equal Protection Clause nor Sixth Amendment afford relief to white co-defendant to join black co-defendant in challenging black juror strikes); United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (Equal Protection Clause does not extend Batson remedy to challenges on basis of gender, and Sixth Amendment does not require "fair cross-section" of community on petit juries); Pope v. State, 256 Ga. 196, 345 S.E.2d 831, 839 (Ga. 1986)

(white defendant cannot challenge black juror strikes); State v. Christensen, 720 S.W.2d 738, 739 (Mo.App. 1986) (white defendant cannot challenge black juror strikes); Kibler v. State, 501 So.2d 76, 77 (Fla.App. 5th Dist. 1987) (white defendant cannot challenge black juror strikes); State v. Hall, 751 P.2d 701, 705-06 (N.M.App. 1987) (black defendant cannot challenge strikes against Hispanic jurors); People v. Crowder, 161 Ill.App.3d 1009, 515 N.E.2d 783, 786 (Ill.App. 1st Dist. 1987) (male defendant cannot challenge strikes against female jurors); Smith v. State, 515 So.2d 149, 150 (Ala.Crim.App. 1987) (white defendant, even with black defense attorney, cannot challenge black juror strikes); People v. Holland, 121 Ill.2d 136, 520 N.E.2d 270, 279-80 (Ill. 1988), cert. granted, sub nom, Holland v. Illinois, ____U.S.____, No. 88-5050

(Feb. 27, 1989) (white defendant has no standing to challenge black juror strikes and no "fair cross-section" required for trial jury by Sixth Amendment).

See also: State v. Jackson, 317 N.C. 1, 343 S.E.2d 814, 826 (N.C. 1986) (Batson rule not retroactive since exclusion of blacks from petit jury does "not bear substantially on the truth finding process" and Sixth Amendment cross-section requirement only applies to pool from which petit jurors are drawn but not to petit jury itself); Pope v. United States, 372 F.2d 710, 725 (8th Cir. 1967) (Blackmun, J.), vacated on other grounds, 392 U.S. 651 (1968) (fair cross-section rule only applies to venire pool, not petit jury members chosen).

But see: United States v. Biaggi, 853 F.2d 89, 95-96 (2d Cir. 1988), cert. denied, ___U.S.___, 57 L.W. 3567 (Feb. 27, 1989) (Court of Appeals upheld

ruling of trial court that sufficient justification given by prosecutor in striking Italian-Americans from jury. District Court, at 673 F.Supp. 96 (E.D.N.Y. 1987), found Batson applies to discrimination against any "cognizable group", racial or ethnic, but that final jury was a fair cross-section of district.); Gov't of Virgin Islands v. Forte, 865 F.2d 59, 64 (3rd Cir. 1989) (Batson rule extends to both white and black defendants, so white male defendant can challenge strikes against white males in trial for rape of black female); Seubert v. State, 749 S.W.2d 585, 588 (Tex.App. 1st Dist. 1988) (same race defendant needed under Equal Protection Clause under Batson, but white defendant can be denied Due Process and Sixth Amendment rights for denial of representative cross-section on trial jury).

CONCLUSION

As seen from the growing number of cases, the issue of whether any defendant may require a prosecutor to justify peremptory strikes, regardless of the race of the defendant or the jurors, is important to the administration of criminal (and civil) trial process. In this case, the issue is squarely presented by a white defendant who was granted a broad new remedy by the Arizona Supreme Court which extends Batson-type relief to all classes of defendants and jurors. The extension of this Court's rule in Batson, pursuant to the Sixth Amendment, presents a conflicting and important question that should be resolved in this case. The issue was not resolved in Teague v. Lane, supra, and is not completely presented in Holland v. Illinois, supra. Therefore, this Court should grant the instant Petition and

rule herein. Based upon the weight of authority discussed above and the precedent of this Court's prior decisions on this area of the jury selection process, the decision of the Arizona Court of Appeals and the supplementing opinion of the Arizona Supreme Court should be reversed.

For these reasons, Petitioner submits this Supplemental Brief and requests this Court to grant the writ of certiorari.

Respectfully submitted,

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State of Arizona

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Chief Assistant
Attorney General

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9194d jd

APPENDIX A

ANTONIO TORRES, Appellant, v.
STATE OF FLORIDA, Appellee

Case No. 87-708

Court of Appeal of Florida,
Second District

1989 Fla. App. LEXIS 462

February 1, 1989, Filed

Appeal from the Circuit Court for Hillsborough County; Donald C. Evans, Judge.

THREADGILL, Judge, CAMPBELL, C.J., and PARKER, J., Concur.

James Marion Moorman, Public Defender, and Robert Mack, Assistant Public Defender, Bartow, for Appellant.

THREADGILL

THREADGILL, Judge.

Appellant, a white defendart who was represented by black counsel at trial, challenges his convictions for

first-degree murder and armed robbery. He contends that the state systematically excluded black jurors, improperly commented on his right to remain silent, and that the court failed to give his requested jury instructions on lesser included offenses. We find no reversible error and affirm.

During voir dire examination of the jury panel before trial, the state exercised five peremptory challenges to exclude five black prospective jurors. Appellant's attorney made timely objections on the basis that the challenges constituted a systematic exclusion of blacks from the jury. Appellant's attorney asked the court to require the prosecutor to provide non-racial reasons for its challenges. The court denied the request, declaring that appellant did not have standing to object because he was white. We agree.

In Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), a white defendant challenged the prosecutor's systematic exclusion of black jurors from the grand and petit jury. The United States Supreme Court, although divided on the opinion, held that whatever his race a defendant has standing to challenge the jury selection system on the ground that it arbitrarily excluded members of any race from jury service without a showing of actual harm or bias. Under Peters, appellant would have standing to challenge the state's exclusion of potential black jurors.

However, in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court subsequently reviewed a black defendant's claims that the prosecutor used his peremptory challenges to strike all four black persons on the venire. The Supreme Court

reversed the conviction because the trial court flatly rejected the defendant's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his reasons. The Court stated that to establish a prima facie case of purposeful discrimination concerning the prosecutor's use of peremptory challenges, the defendant must first show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's own race. 476 U.S. at 96. Obviously, appellant cannot make this prima facie showing as he is white, and the excluded jurors are black.

Some state courts have held that a white defendant has standing to challenge a prosecutor's use of peremptory challenges to eliminate black jurors.

See, e.g., State v. Superior Court, 157 Ariz. 541, 760 P.2d 541 (1988). However, in Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987), the fifth district stated that in order to challenge the exclusion of jurors on racial grounds, a defendant must show he is a member of the racial group being singled out for differential treatment. The court held that in accordance with that rule, first enunciated in Batson, Kibler had no standing to challenge the exclusion of the black jurors. Kibler and his alleged victim were both white, as are the appellant and the victims in this case.

Appellant argues that the Florida Supreme Court decision in State v. Neil, 457 So.2d 481 (Fla. 1984), requires reversal. We disagree. In Neil, standing was not an issue because both the defendant and the challenged jurors were black. Neil held that once an

objecting party demonstrates that those challenged are members of a distinct racial group and that there is a strong likelihood they have been challenged solely on race, the burden shifts to the other party to show otherwise. Neil was decided some seven months before Batson. We agree with the statement in Kibler that nothing in the Neil decision indicates that the Florida Supreme Court intended a different test for standing than that set out in Batson. 501 So.2d at 77.

The identical issue was before the Court of Criminal Appeals of Alabama in Smith v. State, 515 So.2d 149 (Ala. Crim. App. 1987). In Smith, the white defendant contended that the rule in Batson should apply to him because he was represented by a black attorney. The court disagreed and stated:

The very wording of Batson establishes that the excluded veniremen and the defendant must be of the same race. Such a holding leaves no room for any argument that the excluded veniremen and the defendant's attorney need only be of the same race in order for Batson to apply. We, therefore, hold that the rule of Batson does not apply in cases where black veniremen are removed from the jury of a white defendant. In so holding, we find ourselves in agreement with other jurisdictions on this issue. See Kibler v. State, 501 So.2d 76 (Fla. 1987); Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986); State v. Christensen, 720 S.W.2d 738 (Mo. Ct. App. 1986).

515 So.2d at 150.

Because Florida has not extended standing to a white defendant to challenge the exclusion of black jurors, and because the United States Supreme Court in Batson has receded from its position in Peters, we conclude, on the authority of Batson, that appellant did not have standing to challenge the state's exclusion of black jurors. Therefore, the trial court did not err in failing to require the state to provide

reasons for its use of peremptory challenges. However, we find this issue to be of great public importance and certify the following question to the Florida Supreme Court:

DOES A WHITE DEFENDANT BEING REPRESENTED BY A BLACK ATTORNEY HAVE STANDING TO CHALLENGE THE STATE'S EXCLUSION OF BLACK JURORS BY USE OF PEREMPTORY CHALLENGES IN LIGHT OF BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and STATE V. NEIL, 457 So.2d 481 (Fla. 1984)?

Appellant also contends that the trial court erred in denying counsel's motion for mistrial after the state allegedly commented on his right to remain silent. The remarks which the state made were to the effect that the defendant had had his day in court, that the system bends over backwards for defendants, that he had an attorney, and that he put the victim's

family on trial. The prosecutor then commented to the jury that it had not heard any testimony to contradict the state's witnesses. The trial court made a factual finding that the prosecutor's comments referred to defense counsel and not the appellant. It is not improper for a prosecutor in closing argument to review the evidence as a whole and point out that it is uncontradicted. A comment on the credibility of the defense in general as opposed to an individual defendant is permitted. State v. Shepard, 479 So.2d 106 (Fla. 1985); White v. State, 377 So.2d 1149 (Fla. 1979). See e.g. Jones v. State, 253 So.2d 154 (Fla. 2d DCA 1971), cert. denied, 256 So.2d 514 (Fla. 1972), (holding that a similar comment pointed to the fact that the state witness had not been contradicted rather than to the fact that the defendant had not testified). Thus,

the trial court correctly denied appellant's motion for mistrial.

Finally, appellant contends the court erred in denying his requested jury instructions on grand theft and third-degree murder. Florida Rule of Criminal Procedure 3.510 provides that a defendant may be convicted of any offense which is a necessarily included or lesser included offense of the offense charged in the indictment or information and is supported by the evidence.

The offense of grand theft is included in the second count of the indictment which charges robbery of more than $100 with a firearm. The victim testified that the appellant took more than $100 from her. Because the evidence supports the grand theft charge and the charge was included in the indictment, the trial court erred in failing to give this instruction as well as the instruction

regarding third-degree felony murder. However, because the offense of grand theft is two steps removed from robbery with a firearm, the trial court's failure to give this instruction constitutes harmless error. Perry v. State, 522 So.2d 817, 820 (Fla. 1988); State v. Abreau, 363 So.2d 1063 (Fla. 1978); Tobey v. State, 13 F.L.W. 2541 (Fla. 2d DCA Nov. 18, 1988).[1] Likewise, absent the

---

1. Ascensio v. State, 497 So.2d 640 (Fla. 1986), wherein the Florida Supreme Court reversed this court's finding of harmless error with respect to the trial court's failure to give a requested battery instruction. There, the defendant was convicted of aggravated battery with a firearm, a second-degree felony. While an instruction on attempted manslaughter was given, this offense was not listed on the verdict form. Because the offense one step removed from the crime charged was not included on the verdict form, the defendant was entitled to instruction on the lesser included offense of battery. The court, however, upheld the rule articulated in Abreau that a refusal to instruct on a lesser included offense two steps removed from the conviction is harmless error.

grand theft instruction, there is no basis for the third-degree felony murder instruction.

Accordingly, the judgment and sentence is affirmed.

CERTIFICATE OF SERVICE

Three copies of the foregoing Supplemental Brief of Petitioner were served upon Judge Daniel E. Nastro, Respondent, upon counsel for Defendant Elden Gardner, Real Party in Interest, and upon the Solicitor General, by placing them in the United States Mail, first-class postage prepaid, on this 29th day of March of 1989, addressed as follows:

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All parties required to be served have been served.

Timothy C. Holtzen

TIMOTHY C. HOLTZEN
Attorney for Petitioner

Supreme Court, U.S.
FILED
FEB 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1037

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1988

STATE OF ARIZONA,
Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO,
Respondent,

ELDEN GARDNER,
Real Party in Interest.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

SUPPLEMENTAL BRIEF OF THE STATE OF ARIZONA TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a defendant, who is not of the same race as a juror who is removed by the prosecutor's use of a peremptory strike, have standing to assert the equal protection rights of the juror.

2. If such a defendant has the standing to assert the equal protection rights of a juror who is struck, what nature of proof is necessary to make a prima facie showing of a violation of the juror's equal protection rights.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	
ARGUMENT	
BECAUSE THIS CASE PRESENTS THE ISSUE LEFT UNRESOLVED BY HOLLAND v. ILLINOIS, AND BECAUSE THE LEGAL COMMUNITY NEEDS TO HAVE THIS ISSUE RESOLVED, THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI.	3
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

Case	Page
Batson v. Kentucky 476 U.S. 79 (1986)	3
Holland v. Illinois 58 U.S.L.W. 4162 (U.S., Jan. 22, 1990)	3,4,9,10
State v. Superior Court (Gardner) 157 Ariz. 541 760 P.2d 541 (1988)	2,7
State v. Wiley 144 Ariz. 525 698 P.2d 1244 (1985)	7
Swain v. Alabama 380 U.S. 202 (1965)	7

STATEMENT OF THE CASE

Real Party in Interest Gardner is white; his trial attorney is black. (R.T. of Sept. 25, 1986, Appendix A at A-4.) The panel of jurors contained two blacks, Lawrence Griffin and Robert Bronner. (Id. at A-22.) The prosecutor used two peremptory strikes to remove these two jurors. (Id. at A-3.) Upon motion of the defendant, the trial court ordered the prosecutor to give reasons for these strikes to determine whether the prosecutor's actions were racially motivated. (Id. at A-15.) The trial court based this ruling on (1) the right of the defendant to a fair and impartial jury and (2) the right of any American citizen to serve on a jury. (Id. at A-16, A-20.) The prosecutor refused to disclose his reasons for the strikes. (Id. at A-6.) The trial court did note

that there appeared to be nonracial reasons for striking these two individuals: one worked nights and might not be able to stay awake during the trial, and the other had a prior conviction for assault. (Id. at A-24, A-25.) The prosecutor still refused to disclose his reasons and sought review of the trial court's ruling. (Id. at A-27.) The Arizona Supreme Court upheld the ruling of the trial court. State v. Superior Court (Gardner), 157 Ariz. 541, 760 P.2d 541 (1988). The state then petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Because both the trial court and the Arizona Supreme Court based their rulings in part on the conclusion that the actions of the prosecutor violated the equal protection rights of the two

jurors, this case presents the issue left unresolved by Holland v. Illinois, 58 U.S.L.W. 4162 (U.S., Jan. 22, 1990).

ARGUMENT

BECAUSE THIS CASE PRESENTS THE ISSUE LEFT UNRESOLVED BY HOLLAND V. ILLINOIS, AND BECAUSE THE LEGAL COMMUNITY NEEDS TO HAVE THIS ISSUE RESOLVED, THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that a prosecutor's discriminatory use of peremptory strikes violates the equal protection rights of the persons struck from the jury, and that a defendant may make a prima facie showing of discrimination by showing that he or she is a member of a cognizable racial group and that the prosecutor has used the peremptory strikes to remove from the

venire all members of the defendant's race. 476 U.S. at 96. In Holland v. Illinois, this Court held that a defendant who is not of the same racial group as the persons struck from the venire has standing to raise a claim under the sixth amendment, but that the sixth amendment's right to a jury comprising a fair cross section of the population extends only to the panel from which the attorneys make their strikes and does not extend to the actual petit jury selected. 58 U.S.L.W. at 4163, 4164. This Court specifically did not address the question whether a defendant who is not of the same racial group as a person struck from the venire has standing to raise a claim based on the equal protection rights of the person who was struck. 58 U.S.L.W. at 4163; 58 U.S.L.W. at 4166 (Kennedy, J.,

concurring); 58 U.S.L.W. at 4167 (Marshall, J., dissenting); 58 U.S.L.W. at 4171 (Stevens, J., dissenting).

In the present case, the trial court based its ruling in part on the reasoning that the prosecutor's actions, if racially motivated, would violate the equal protection rights of the persons struck:

> So my decision is two-fold.
>
> Number one, with respect to the rights of this defendant to equal protection along the lines that I have just stated and I think to the basic inherent right of a trial juror, of a black to serve as a member of a jury . . . .

(R.T. of Sept. 25, 1986, Appendix A at A-16.)

> [I]f it appears under the circumstances that a juror may be

> excluded solely on the basis of his black origin, that that is a right that has to be protected and that does permit me to ask the threshold question of counsel, and that I would then indicate that on that basis, I would find that a prima facie case had been shown to permit me to ask that question.

(Id. at A-20.) The Arizona Supreme Court noted the two different reasons for the trial court's ruling:

> Relying on the equal protection clause of the fourteenth amendment and, arguably, also on the sixth amendment right to a trial by an impartial jury, the judge ruled that he had a proper basis to inquire into the prosecutor's motives in using the peremptory

challenge to strike the Black veniremen.

State v. Superior Court (Gardner), 157 Ariz. at 542, 760 at P.2d 542. The Arizona Supreme Court noted that, in its earlier case of State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985), it had applied the rule in Swain v. Alabama, 380 U.S. 202 (1965), to attacks on the discriminatory use of peremptory strikes based both on equal protection grounds and on sixth amendment grounds. 157 Ariz. at 544, 760 P.2d at 544. It then overruled Wiley and upheld the ruling of the trial court. 157 Ariz. at 544, 760 P.2d at 544. It first concluded that the defendant had standing under the sixth amendment to challenge the use by the prosecutor of peremptory strikes. 157 Ariz. at 544, 760 P.2d at 544. It next concluded that the sixth amendment

guarantee of an "impartial jury" extended not just to the selection of the jury panel, but also to the selection of the trial jury itself. 157 Ariz. at 545, 760 P.2d at 545. It finally concluded as follows:

> The harm done by such state discrimination is not limited to violation of a defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship.

157 Ariz. at 545, 760 P.2d at 545.

The first conclusion, that a defendant has standing under the sixth amendment to challenge the use of peremptory strikes, is consistent with this Court's opinion

in Holland. 58 U.S.L.W. at 4163. The next conclusion, that the sixth amendment guarantee of an "impartial jury" extends not just to the selection of the jury panel, but also to the selection of the trial jury itself, is opposite to this Court's opinion in Holland. 58 U.S.L.W. at 4164. If that were all that the Arizona Supreme Court had said, the remedy would be to remand the matter for reconsideration in light of Holland. But all the Arizona Supreme Court would do is eliminate that part of its opinion based on the sixth amendment claim, and reach the same result relying on that part of its opinion based on the equal protection claim. This case therefore squarely presents the question left open by this Court's decision in Holland: Whether a defendant who is not a member of the same race as a juror who is struck may raise a

claim based on the equal protection rights of the person who is struck. Further, assuming that such a defendant has standing to assert the equal protection rights of a juror, this then raises the question of what nature of proof is required to make a prima facie showing of discrimination and thus shift the burden to the other side to justify the use of the strikes. A grant of the petition for writ of certiorari is therefore necessary to resolve these questions.

CONCLUSION

This Court's decision in Holland left open the question whether a defendant who is not a member of the same race as a juror may raise a claim based on the equal protection rights of that juror, and, assuming that such a defendant has standing to assert such a equal

protection claim, what nature of proof is required to make a prima facie showing of discrimination and thus shift the burden to the other side to justify the use of the strikes. Because both the trial court and the Arizona Supreme Court based their decisions in part on the equal protection claim, this case presents these questions. Petitioner therefore requests that this Court grant petition for writ of certiorari and resolve these questions.

Respectfully submitted,

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DATED: February 8, 1990

CERTIFICATE OF SERVICE

THREE COPIES each of this Brief were mailed February 8, 1990, to:

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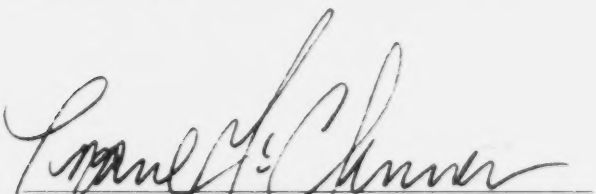

CRANE McCLENNEN
Attorney for PETITIONER

CRM86-0631/2449D

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
Plaintiff,	)	No. CR-155598
	)	
vs.	)	
	)	
ELDEN MIT GARDNER,	)	
	)	
Defendant.	)	
	)	

Phoenix, Arizona
September 25, 1986

BEFORE: THE HONORABLE DANIEL E. NASTRO

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MARGARET HARCARIK
Court Reporter

APPEARANCES:

FOR THE STATE: TIM HOLTZEN
Assistant Attorney General

FOR THE DEFENDANT: JUDIS R. ANDREWS
Deputy Public Defender

THE COURT: This is cause number 155598, entitled State of Arizona versus Elden Mit Gardner.

The record should reflect that we are in chambers.

The record should reflect at this time the presence of --

MR. HOLTZEN: Tim Holtzen from the Attorney General's office on behalf of the State of Arizona.

MR. ANDREWS: J. Andrews from the Maricopa Public Defender's office. Present is my client, Elden Gardner.

THE COURT: The record should reflect at the conclusion of yesterday's proceedings, counsel indicated they would make available to the Court the case of Batson versus Kentucky, and that the Court has at this time the copy of that case and has considered the case and the ramifications of the case with respect to the issue that counsel have raised.

The record should further reflect that the Court has conferred informally with counsel about the various aspects that are at issue here, and the Court has given a preliminary indication to counsel concerning its feelings, and counsel indicated that a special action would be taken and at this time, gentlemen, we will be making our record.

Mr. Andrews, do you wish to proceed first?

MR. ANDREWS: Yes, your Honor.

I raised on yesterday last the issue of Batson versus Kentucky, with regard to my client, Elden Gardner.

I call the Court's attention to page 1720 of the Supreme Court Reporter, 106. The case is cited at 106, Supreme Court Reporter, 1720, and specifically the language, and it is the last paragraph, left side, beginning with, "It was impermissible for a prosecutor to use his

challenges to exclude blacks from the jury for reasons wholly unrelated to he outcome of the particular case on trial," and I underlined or, "to deny to blacks the same right and opportunity to participate in the administration of justice enjoyed by the white population."

On yesterday last you Honor, Mr. Holtzen struck the only two members of the jury panel who were black. That raises two issues in my mind, and I think Batson is on point with both those issues.

The first issue being, whether or not the prosecutor can use preemptory strikes at will to deny blacks an opportunity to participate in the administration of justice, by being of service on the venire panels as well as juries.

My thought being this, there is only two blacks in a panel of 35 sent up to us in the first place. Now, Mr. Holtzen has struck both the blacks from the jury

panel by the use of preemptory strikes. As a result of that, blacks have been denied in this case, this particular case, and I believe Batson speaks to a case by case assessment of an opportunity to participate in the fair administration of justice.

I would bring to the Court's attention the point although my client is white, I happen to be black, and that I believe and I am of the opinion that Batson goes to that issue and certainly the Rousseau case out of California which is commented on by Justice Marshall in his concurrent opinion in the Batson case, which speaks to the issue that my client, Mr. Gardner, may be being deprived of a fair opportunity for trial as well as due process because blacks are stricken from the jury panel solely because in his case he has the burden, if you will, or the privilege, and I don't know which one it

is, of being saddled with a black attorney.

As a result of that, he does not have an opportunity for the equal protection of law guaranteed under the constitution of having a fair jury panel made up of peers from the various communities.

Now, I am of the opinion, your Honor, that these matters are covered in Batson. I am of the opinion that my client is entitled to those things that I have stated. I am of the opinion that blacks are entitled to participate in the administration of justice and I think those things are set out quite clearly in Batson versus Kentucky, the cite I previously have given to the Court, and for those reasons, your Honor, I would urge and I would say to the Court that Batson provides the remedy, and that is that once Mr. Holtzen has stricken these people that the Court has a right to

inquire of him as to why he has stricken these people, who are the only two blacks that were on the panel, that upon the Court being satisfied as to his answers, I have no further remedy. However, I do have a right and the Court has a right to make inquiry of Mr. Holtzen as to why they have been stricken.

That's all I have.

THE COURT: Mr. Holtzen?

MR. HOLTZEN: Thank you, your Honor. May it please the Court. I think the case law in Arizona in the past, and from the United State Supreme Court still protects the area of the mental processes of a lawyer in using his preemptory strikes.

The case of Batson versus Kentucky, recently granting a limited situation wherein those mental processes can be probed. My position is, it is very clear in the language of the United States

Supreme Court that before we begin probing the minds of lawyers as to why they have used their preemptory challenges, there is a least a two-step process. The first step is clear.

In Supreme Court Opinion, 106, Supreme Court Reporter, 1722, where it says, "The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment."

There is no showing that Mr. Gardner is such a member of such a group.

Also on page 1723, the Court again refers to it when it says at the top of the page --

THE COURT: Sorry, what page?

MR. HOLTZEN: Page 1723, 106, Supreme Court Reporter, at 1723, where the Court says, "To establish such a case, the defendant first must show that he is a member of a cognizable racial group," and

then it goes on to talk about the further showing. That would be the second step of showing of a prima facie case, that the strikes by the prosecutor were that sort of intentional discrimination by the strikes. My approach is two-fold. Number one, there is absolutely no showing of this defendant having any standing to challenge my actions in preemptory strikes nor is there any justification for violating that rule that protects the lawyer's produce in his own mind but secondly, I submit that there is no showing before the Court to meet the second case, a prima facie case that my action in striking two black jurors, that those actions alone are sufficient to show a prima facie case that there were any discriminatory actions against the group of blacks.

I submit that it is in essence a question of the defendant's standing to

make this challenge. He has no standing.

Secondly, there is no prima facie showing -- the fact that Mr. Gardner is white does not give him the right to question the challenging of anybody or, excuse me, the challenge of a prosecutor as to any particular juror who may not be of the same category as he.

Perhaps if there were only two witnesses on the panel and I stroke those, Mr. Gardner may have that right then. He may have that standing, but his personal rights under the 14th Amendment, are the only things he can invoke.

He can't invoke Mr. Andrews' right, that is, his black attorney. He cannot now be enshrined with that special recognition because he has a black lawyer. I think I submitted informally before the argument if Mr. Gardner then were to have a black lawyer and an Italian investigator and a Chinese prime

witness for an alibi, would he then be able to say that that additional ethnic origin, or those additional ethnic origins entitled him to challenge any preemptory strike of any of those individuals, but I think as I have understood in the Court's informal thought exchange with us, that the Court's opinion is that Mr. Gardner would have the right regardless of who represents him or who his investigator is to challenge, if the prosecutor essentially, systematically excluded any racial group or any ethnic group and I think if I understood the court correctly, really there are two questions.

First of all, would he have that right regardless of who represents him and secondly, is there in this particular case because his attorney is black, a right of Elden Gardner to make this challenge and probe, and therefore since

I say that neither of the two have been met, neither the standing nor the prima facie showing that I ought not and will not answer the question at this time and ask for a stay to approach the Appellate Court.

THE COURT: Mr. Andrews, do you have anything further?

MR. ANDREWS: Briefly, your Honor. I simply would point out to the Court at 106, Supreme Court Reporter, at 1727, Justice Marshall, in his concurrent opinion basically sums up the position that Mr. Holtzen, I don't believe really addresses and that is this, and I am quoting from the opinion of Justice Marshall.

"This court explained more than a century ago that in the selection of jurors to pass upon a defendant's life, liberty or property, there shall be no exclusion of his race and no

discrimination against them because of their color."

It goes on to say that, "Exclusion of blacks from a jury, solely because they are black," citing Justice Rehnquist, "Is at best based upon crudely stereotypical and, in many cases hopelessly mistaken notions."

Then he includes what I think is the relevant issue in Batson, by saying, "I wholeheartedly concur in the Court's conclusion that use of the preemptory challenge to remove blacks from juries on the basis of their race, violates the Equal Protection Clause." and I think that's behind the entire Batson case and I think that the rulings of the Court are proper and I think that the constitution protects by the Equal Protection Clause, the right of blacks to serve on the jury and not be excluded solely because of race, and my client's right is not to be

jeopardized by not having any blacks on the jury solely because his attorney happens to be from the minority group.

THE COURT: Okay, gentlemen, I have listened to the respective arguments of counsel and I have further read the cases that counsel have referred to and I am aware of the particular factual background in the Batson versus Kentucky case wherein we had a black defendant and four veniremen who were of black origin who were excluded by the exercise of preemptory challenges and I am aware of the statement and rationale of the majority in the Batson case which stated in essence that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black

defendant and, I am aware as Mr. Holtzen indicated in that case, the focal point of the decision was on the right of this black defendant to a fair and impartial jury and that if the sole reason for the exercise of the preemptory challenge was because of the veniremen's racial origin, then that defendant was being denied the equal protection of law.

I am also aware of the use by the Court of the conjunction, "or", and in reading the opinion of the Court, and it is my determination that the Court is saying inferentially there, that you cannot exclude a juror solely on the basis of his origin and that a corollary of that is, and I think a basic right that an American citizen has, be he Black, Caucasian or of Asian origin, is to serve as a trial juror and participate in the democratic process if he otherwise qualifies. And that in a situation where

there is a preemptory challenge and the Court under the circumstances, feels that on the totality of the circumstances, that it is appropriate to inquire of the prosecutor as to the reason for the exclusion and if the Court determines that there is a reasonable reason, over and above the elimination of that juror because of racial origin, that would be the end to it and I am aware of Justice White's I believe, concurring opinion and the problems that may have been set forth with the judge having to look behind the mental processes of the prosecutor and I think Judge White discusses that on page 1728 of the opinion.

I have also given this some in-depth analysis and we have here a situation where we have a white defendant being represented by a black attorney and, is this white defendant being denied equal protection of the law if a juror of black

origin is being selectively eliminated because of his origin, because there may be a feeling of empathy or sympathy with the black attorney. Then, that white defendant I feel is being denied equal protection and that the rationale of Bateman occurs. So my decision is two-fold.

Number one, with respect to the rights of this defendant to equal protection along the lines that I have just stated and I think to the basic inherent right of a trial juror, of a black to serve as a member of a jury, and in reading the cases, and I focused in on the case of People versus Rousseau, 129, Cal. App., 2nd, 526, 179, California Reporter, 892, a 1982 case, in which there were just two preemptory challenges exercised against the two jurors who were black but, and the court indicated that the defense failed to meet the burden on appeal.

However in focusing in on the issue as to, do we consider solely the rights of the defendant to equal protection of the laws or must take into consideration the rights of the trial juror who has been summoned as a juror to sit and not be excluded solely on the basis of his color or national origin and the California Court on page 536 stated as follows: "Appellant contends that the prosecutor systematically excluded blacks from the jury, thereby violating appellant's right to trial by jury." California Constitution, Article One, Section Sixteen. "A prosecutor's use of preemptory challenges is presumed to be constitutionally permissible. The presumption may be rebutted if the defendant establishes a prima facie case that the prosecutor has challenged jurors on the basis of group bias alone." People versus Wheeler, 1978, 22 Cal.3rd,

258, 278, 280, 148 California Reporter 890, 538, P.2d, 748. "To advance a claim of discriminatory exclusion, the defendant must establish as complete a record of the circumstances as is feasible.

Second, he must establish that the persons excluded are members of a cognizable group.

Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias."

"The defendant may demonstrate systematic exclusion by showing that, one, the prosecutor has excluded all or most of an identified group from the venire; two, he has used a disproportionate number of preemptory challenges against members of this group identification in common; or four, apart

from their group identification they are as heterogeneous as the community as a whole." People versus Wheeler, supra, 22 Cal.3rd at page 280.

"If the defendant makes a prima facie case, the burden shifts to the prosecution to show that the preemptory challenges were not predicted on group bias alone."

Now, that apparently is the special question. Considering the totality of the circumstances and the answers phrased by the two black veniremen and their willingness to serve as trial jurors and the counsel indicates that they found them to be fair and impartial and also I should point out that apparently the first preemptory challenge was exercised by Mr. Holtzen and then the next six by Mr. Andrews, not following the recent pronouncement or the recent law with respect to alternates, then out of the

remaining 14 veniremen, these two blacks were excluded. I fell that for the reasons that I have stated and, let me digress a moment and go back.

I believe that the Rousseau case focuses in on the rights also of blacks or members of any minority, or any group to serve as a juror and that in the democratic process as the trial judge I have be cognizant of that fact and if it appears under the circumstances that a juror may be excluded solely on the basis of his black origin, that that is a right that has to be protected and that does permit me to ask the threshold question of counsel, and that I would then indicate that on that basis, I would find that a prima facie case had been shown to permit me to ask that question.

Now, I recognize from our conversations, gentlemen, that a formal, written petition for a stay has to be

prepared by counsel. Is that correct, gentlemen?

MR. HOLTZEN: Yes.

MR. ANDREWS: Correct, your Honor.

THE COURT: And correct me if I'm wrong, counsel conferred with a clerk of the Court of Appeals and he indicated that that would be, that that's the process and in that regard, gentlemen, I propose to do the following. I propose to discharge the jury insofar as having them telephone in to court tomorrow between the hours of 3:00 and 4:00 to advise as to whether this case is to be continued to Monday based upon whether the stay is or is not granted.

I further propose to admonish this jury not to discuss this matter, that a legal matter has come up which requires clarification and that if there is any reporting of this, either in any news media, that they are not to read that

article or if it comes upon on the radio, to turn the radio off or leave the room if it's on a T.V. and not to discuss it with members of their family.

Now, is there anything further, gentlemen, of a procedural standpoint that you think should or needs to be done or addressed? Can you think of anything?

MR. HOLTZEN: There are only a couple of factual things I want to get clarified, but the procedure in terms of what to do with the jury and what needs to be done concerning the special action, I have nothing further, except I guess, specifically what I have asked is that this Court stay the action until Monday morning for me to have the opportunity to ask the Appellate Court for a stay during the pendency of their consideration.

THE COURT: And I am granting that request for a stay.

Mr. Andrews, do you have anything?

MR. ANDREWS: No, your Honor.

THE COURT: Mr. Holtzen, you had some factual questions?

MR. HOLTZEN: First of all, I am not sure if on the record we ever identified who the black veniremen were.

THE COURT: The black veniremen were, and I am going the numbers of the jurors, juror number eighteen, Lawrence Griffin, and he was among the original 21 empaneled.

Juror number twenty-five, Robert Bronner, and if my memory serves me correctly, he was the last juror empaneled after I had excused juror number twenty, Kathy Guiher, for cause and that was really almost at the conclusion of the voir dire.

MR. HOLTZEN: The other thing, we had discussed informally was at this point the court came to the conclusion that Mr. Griffin, who was the juror who told

the Court he probably couldn't stay awake through the trial, that particular juror, you're not inquiring as to --

THE COURT: Let me make my position. When we were talking today informally, if I recall my statements in regard to that, was when we were talking about the questions propounded concerning your making an answer, I said that assuming again, and this is when I think we were talking about what the trial judge has to consider as set forth by Justice White on page 1728, I said that in all probability and the answer made to say that he, Mr. Griffin indicated that he was working nights and that I believe he said sometimes he gets five hours sleep or something a night and I questioned him on that -- he needs at least seven and I said to him, I said, okay, if you have any problems or are tired, let us know. Raise your hand, and we'll take a recess

to refresh you, and he said yes, he would, and did say he could be fair and impartial and I said if they reason were propounded to me and then speaking in the context of Justice White, I struck him and I said I'd probably be very -- may have well stricken him.

Again, I'd have to compare it to who else was on the list. Out of deference to him, I probably would be in a position, and I would consider that to be a valid reason for a strike and I think Mr. Andrews may have chimed in also that he said that was so. Mr. Bronner indicated, you know, his willingness to serve. I know he did say, I believe he had a past history, a felony for aggravated assault, or assault, and probation and if my memory serves me correct, he said it was five years ago.

MR. ANDREWS: A good time ago.

THE COURT: So that is where I was coming from and I was talking about that in the context of what the judge had to go through, the trial judge, in terms of evaluating the rational for the strike.

MR. HOLTZEN: Okay, and let me make sure it's clear. I understood during the noon hour that your ruling was, was going to be that I would have the inquiry made to me of my reasons for striking Mr. Bronner. I was not under the impression you were going to be asking as to both black individuals.

THE COURT: Since both were black, I necessarily have to ask as to both blacks.

MT. HOLTZEN: Is it then the Court's conclusion that the defendant has come forward with the prima facie showing as to both of those individuals, excuse me, the prima facie showing requiring me to answer.

THE COURT: Yes, since there were only two blacks on the jury panel and those have been stricken.

MR. HOLTZEN: And the Court, under the totality of the circumstances, considers that then the Court is entitled to inquire as to my reasons for striking both of those men?

THE COURT: Right. Okay, are there any other points you wish to clear up, gentlemen?

MR. ANDREWS: No.

MR. HOLTZEN: I don't think so, your Honor.

THE COURT: Now, so we understand, this matter is bing stayed until next Monday and I am going to have the jury indicate and call up and I am going to say Monday at 11:00, Okay?

MR. ANDREWS: Fine.

MR. HOLTZEN: Sorry?

THE COURT: The jury is going to call tomorrow but I am staying this, for the record, to Monday at 11:00. The jury will be required to call tomorrow.

MR. HOLTZEN: Between 3:00 and 4:00?

THE COURT: Right. Okay, and I think I'll give, tell them to call 261-5976, which is one of the other lines. All right?

MR. HOLTZEN: Okay.

THE COURT: Which normally is not being used, so that there's no delay in their getting through.

MR. HOLTZEN: If we have 21 jurors calling in on our --

THE COURT: It will be from 3:00 to 4:00 and I will tell them to call in.